CORPORATION OF CALCUTTA

LEGAL OPINIONS

AND

RULINGS.

APRIL 1909—MARCH 1913.

CALCUTTA

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1913.

PART I.

Select Rulings.

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PART I.

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Nuisance, Definition of—Discussion as to its scope.

KHAGENDRA NATH MITTER
vs.
BHUPENDRA NATH DUTT.

Secs. 3 (29) & 632. *Nuisance.*

Babu Khagendra Nath Mitter erected a wall 40 feet high between his premises and the adjoining premises of the complainant, Babu Bhupendra Nath Dutt, at 79 and 80, Bechu Chatterjee's Street. There was no space to clear the filth which would accumulate or the drainage between it and the opposite party's house. The wall was held to be a nuisance, and the Magistrate ordered its demolition to a height of 12 feet from the ground. The party thereupon appealed.

Khagendra Nath Mitter *vs.* Bhupendra Nath Dutt

Held—That a *public* nuisance is one that affects the King's subjects at large or a considerable portion of them, such as the inhabitants of a town.

That a *private* nuisance, on the other hand, is one that affects only one person or a certain determinate number of persons and is only amenable to the Civil Law.

That the definition of "nuisance" in the Municipal Act, although wider than the common law definition of "public nuisance," does not extend to the inclusion of all private nuisances.

That nuisance, under the Calcutta Municipal Act, may affect the lives and property of individuals or defined bodies of persons resident in a specified area.

Secs. 3 (29) & 632. *Nuisance* (concld.)

That building a wall, however high, on a man's own property for the purpose of preventing his neighbours from acquiring rights of easement over his land is not in itself a nuisance under the Calcutta Municipal Act, but may become one in certain circumstances.

Khagendra Nath Mitter *vs.* Bhupendra Nath Dutt.

That the wall in question was, by the testimony of the Health Officer and of one of the leading Presidency Surgeons, likely to prove injurious to health.

That the Magistrate, instead of ordering demolition of the wall above a certain height, should have passed such an order as would have abated the nuisance which existed at the foot of the wall and behind it such as the opening of arches at the foot, etc.

[Holmwood and Fletcher, JJ 7-11 10 15 C W N p 216]

Nuisance, Definition of—What constitutes nuisance under the Act—Making cleansing of streets more expensive if nuisance.

NARENDRA NATH MITTER
vs.
CORPORATION

Narendra Nath Mitter *vs.* Corporation.

A large bustee, owned by Kumar Narendra Nath Mitter and abutting on the Circular Road and Gas Street, had been the subject of improvement under the Act and certain streets and passages had been opened out. The Municipality claimed to take wheel traffic through every one of these streets and to make them in effect thoroughfares for wheel traffic. The owner having found that the public were in the habit of using his private streets as thoroughfares, put up certain posts which had the effect of preventing the carts passing through the bustee from east to west and from north to south, leaving the

opening on to the Upper Circular Road open and free at all times for any carts which had business in the bustee; these could go all over the bustee and all round it and out again by the same passage by which they entered. The Municipality upon this charged the owner with creating a nuisance. The Municipal Magistrate came to the finding that the nuisance consisted in the annoyance to the conservancy overseers and other Municipal employees when they found that the carts could not get in and out of the bustee by the shortest route but they had to go back by the same way they came in. He ordered the removal of the posts.

Secs. 3 (29) & 632. *Nuisance.* (concld.)

Narendra Nath Mitter *vs.* Corporation

Held—That although it might be inconvenient to the Municipal servants, and although it might add to the expense of cleansing the bustee, it could not in any way interfere with the effective cleansing of the bustee, and that the Act in question did not constitute a nuisance.

[Holmwood and Dass, JJ 25-8-1910 15 C. W. N. p. 100.]

Private Street, Definition of—Pathway made by joint owners of a private street.

HARIMATI DASSI

vs.

CORPORATION.

Four buildings owned by four different persons and bearing four different assessment numbers abutted on a narrow common passage. One of the owners put up a verandah which was held to be objectionable under Rule 2 of Schedule XVII, as it abutted on a private street. The Magistrate held that the passage in question was not a public street; nor did it come within the exception provided in Sec. 3 (35) as being a pathway made by

Sec. 3 (35). *Private Street.*

Harimiati Dassi *vs.* Corporation.

Sec. 3 (35). *Private Street.* (concld.)

the owner of a building on his own land to secure access to or the convenient use of such building. The Magistrate concluded that it was a private street, and that Rule 2 (2) of Schedule XVII therefore applied, and he ordered the demolition of the verandah. The party thereupon appealed.

Hanmati Dassi vs Corporation

Held—That the passage in question was not a private street, and that it was clearly a pathway made by the owners of the buildings on their land to secure access to or for the convenient use of such buildings.

That it could not be said that the singular does not include the plural or

That the co-owners were not each entitled after partition to have the same right as they had before jointly.

[Holmwood and Fletcher, JJ 10 11-10 13 C L J p 219]

Re-erection, Meaning of—Repairing roof on existing shed if re-erection—Building line, infringement of—Tin shed if a building.

TRIPUNDESHUR MITTER

vs.

CORPORATION

Secs. 3 (39) & 351. *Re-erection, Building Line.*

Tripundeshur Mitter vs. Corporation.

The petitioner had a timber yard at 61, Russa Road North, and there had been in existence on that yard for over 10 years an ordinary shed used as a working place for carpenters. In January 1911, he made certain necessary repairs of the thatches in the roof of the said shed without any change in the dimensions or height or without any alteration in any other part of the same. Proceedings were instituted against him on the ground that he had re-erected a hut without sanction, and that

the hut fell on the prescribed road line of Russa Road North in contravention of Sec. 351 of the Calcutta Municipal Act. The Magistrate convicted the petitioner, and directed that so much of the hut re-erected be demolished as would remove the hut from the prescribed road line, and leave six feet open space from the masonry building on the north. Against this order the petitioner moved the High Court.

Secs. 3 (39) & 351. *Re-erection Building Line.* (concld.)

Held—That it was not a case of "re-erection" as the removal of the roof for repairs did not alter the cubical contents of the shed, and that Sec. 3 (39) did not therefore apply.

Tripundeshur Mitter v. Corporation.

That it was a question whether this shed consisting of four posts and a tin roof could be regarded as a "building," and

That the offence of infringing on a building line is the erection or re-erection of the wall of a building within that line. the replacing of the roof on four posts already in existence did not constitute the offence.

[Holmwood and Chatterjee, JJ 3-8-11 16 C W. N. p. 23]

General Committee—Election by Ward and Nominated Commissioners—Field of selection if limited to their own number—Mandamus, conditions for grant of—Quo-warranto if in existence in India and if justifiable.

In the matter *re*
MR. A. C. BANERJEE

Under Sec. 9 (1) of the Calcutta Municipal Act, the General Committee shall consist of 12 members and the Chairman; under Clause (2), of the 12 members 4 shall be elected by the 25 Ward Commissioners and

Sec 9 *General Committee Election.*

Sec 9. *General Committee Election* (contd.)

4 by the 25 Commissioners appointed by the Bengal Chamber of Commerce, the Calcutta Trades' Association, the Calcutta Port Commissioners and by the Local Government.

After the General Elections of 1912, the Secretary to the Corporation sent out to each Commissioner a letter as usual enquiring whether he was willing, if elected, to serve on the General Committee. Mr. Banerjee replied stating that he was willing to serve on the Committee if elected by the Ward Commissioners. From all the replies received two lists were prepared, one on white paper containing the names of the Ward Commissioners and another on yellow paper containing the names of the Nominated Commissioners who had expressed willingness to stand for election to the General Committee. At the meeting of the Corporation, held on the 4th April 1912, the Chairman asked the Commissioners present to separate themselves into two bodies, *i e*, Ward Commissioners in one body and Nominated Commissioners in another, for the purpose of electing 4 Commissioners from each body to represent them on the General Committee. The Ward Commissioners were supplied the white papers containing the list of Ward Commissioners who had offered for election, and the Nominated Commissioners the yellow papers containing the names of the Nominated Commissioners who were willing to be elected. Each paper contained a direction to keep four names for whom the Commissioner would give his vote and to strike out the rest. Mr. Banerjee failed to be elected by the Ward Commissioners and he obtained a Rule, calling upon the Chairman to show cause why he should not convene a proper meeting of the Corporation for electing 8 members to the General Committee according to law. He also applied to the High Court for an order, directing the eight members already elected to refrain from sitting or taking any part in the pro-

Re Mr. A. C Banerjee

ceedings of the General Committee. His main contention was that, under the law, it was open to both the Ward and Nominated Commissioners to select any four Commissioners to represent them, and that by restricting the choice of candidates to 4 among their own number his chances of being elected by the Nominated Commissioners were injuriously affected.

Sec. 9. *General Committee Election.* (concld.)

Held—That, on the construction of the clear words of Sec. 9, the Ward Commissioners could go outside their number and elect any 4 Commissioners to represent them; so also the Nominated Commissioners.

That in view of the fact that the Statute had been so framed that each of these two bodies—*i e*, those elected by popular franchise and those not so elected—shall have equal representation on the Committee, and that in practice neither the Ward Commissioners nor the Nominated Commissioners would elect their representatives outside their numbers, it could not be entertained that Mr. Banerjee's chance of election had been prejudiced.

Re Mr A. C. Banerjee.

That the grant of a mandamus was discretionary, and was not justifiable under the circumstances.

That in regard to the proposal for an order on the members of the General Committee in the nature of *quo warranto*, although the remedy of the nature of *quo warranto* did exist in India, having been introduced with the Law of England on the establishment of the Supreme Court—there was no specific statutory provision showing that it had been taken away—the court ought not to grant this relief.

The Rule was dismissed with costs.

[Fletcher, J., 29-4-1912.]

Loans, Repayment of—Sinking Fund, application of. If total accumulation in the Fund or only the portion accrued in respect of a particular loan could be utilised for its discharge—Trustees if entitled to use discretion or bound to comply with Corporation demands in application of moneys for repayment of Loans.

CORPORATION
vs.
THE TRUSTEES TO THE CORPORATION SINKING FUND.

Sec. 136. *Sinking Funds, Application of.*

In connection with the re-payment of the Corporation Loan for 20 lakhs, which fell due on the 1st December, 1911, the Trustees to the Sinking Fund urged that as owing to the defective provisions of the law and the rate at which the contribution to the Sinking Fund was made, the period required for the maturity of the Sinking Fund in respect of a particular loan was so much longer than the period of currency of the debentures of that loan, the practice previously followed of drawing upon the total accumulation in the Sinking Fund in respect of all loans instead of utilising only the amount which had accumulated in respect of the particular loan, which fell due for repayment had depleted the Fund to a large extent, and was therefore financially unsound and was opposed to the true spirit of the law, which contemplated the repayment of debt by means of a Sinking Fund. Therefore, although the total accumulations in the Fund amounted to over Rs. 38 lakhs in the present instance, they declined to pay out of the Fund more than Rs. $3\frac{3}{4}$ lakhs only which had accumulated in the Fund in respect of this particular loan, and suggested that the balance of the amount required might be raised by borrowing. The Corporation, on the other hand, proposed that the whole sum of Rs. 20,

Corporation *vs.* Sinking Fund Trustees

lakhs required should be withdrawn from the Sinking Fund. It was pointed out to the Trustees that the course suggested by them would cause undue loss to the Corporation in respect of stamp duty, etc., and would reduce the borrowing capacity needlessly, and that the interests of the Sinking Fund were sufficiently safe-guarded by the fact that the Corporation had decided to make additional contribution towards repayment of loans to a special reserve fund to make up the deficit in the Sinking Fund, and that no other loan would fall due for re-payment before 1915 by which time the Act would surely be amended to remedy the defect which had caused all this shortage. The Trustees were informed that under Secs. 135 (1) and 136 read together every loan as it fell due must be paid from the accumulations of the Sinking Fund as far as practicable with the amount at its credit, and that the balance, if any, would be paid by the Corporation. Nevertheless, the Trustees declined to alter their views, and, on the advice of the Advocate-General, they contended by reason of the use of the word "may" in Section 136 that as Trustees they were entitled and bound to exercise a sound discretion in giving their consent to the withdrawal of funds, and that they were not bound to comply with a requisition from the Corporation if they considered the action proposed to be financially unsound. The contention on behalf of the Corporation was that, under Section 129, it was the Corporation and not the Trustees who could determine what amount should be borrowed, that the Act did not require separate accounts for each loan to be kept or prescribe a separate Sinking Fund for each loan; that in the matter of investment of all moneys paid into the Sinking Funds and of variation or transposition of any securities made over to them, the Trustees were under the orders of the Corporation and submitted accounts to that body; and that the

Sec 136. *Sinking Funds, Application of.* (contd)

Corporation *vs* Sinking Fund Trustees.

Sec. 136. *Sinking Funds, Application of* (concld.)

Trustees had no option but to apply the Sinking Fund in their hands, so far as the same sufficed, towards repayment of the loan. This view of the Corporation was supported by an opinion obtained from Mr. S. P. Sinha. As the Corporation and the Trustees could not come to any agreement, a reference was made to the High Court under order XXXVI, Schedule I, of the Code of Civil Procedure.

Held—That the Act had not directed the Corporation to create a separate Sinking Fund for each loan and there were no words in the Act to authorise the position taken up by the Trustees, *viz.*, that each particular loan was entitled to an aliquot charge only upon the Sinking Fund, and that the Trustees were not entitled to say that only such portion of the Sinking Fund which they consider ought to be allotted as the share of that Fund applicable towards the redumption of the loans that are already due is only available.

Corporation *vs* Sinking Fund Trustees

That although the Corporation could borrow under Sec. 129 to pay off a previous loan, they could under Sec. 139 only borrow, unless they obtained the express sanction of the Government of India, for the unexpired portion of the period for which the previous loan was sanctioned. In the present instance the 20 lakhs loan had been borrowed for 15 years all of which had expired.

That as the Act stands, the Trustees are bound to apply the Sinking Fund at the request of the Corporation for the purpose of repaying on due date debentures becoming due.

The Trustees were accordingly directed to comply with the request of the Corporation and the Trustees' costs in the suit were ordered to be paid out of the General Funds of the Corporation.

[Fletcher J., 12-2-12.]

Boundary Wall if Building and assessable to Rates. Statutes, Interpretation of—Construction first placed by those whose duty is to execute it, Value of.

CORPORATION
vs.
BENOY KRISHNA BOSE.

In revaluing certain premises belonging to the opposite party for rates the compound wall had been regarded as a part of the building. On the party appealing to the Court of Small Causes under Sec. 162 the Judge held that the boundary wall had been wrongly included and directed that it be excluded. Against this order the Corporation obtained a Rule. The Court in discharging the Rule with costs,

Secs. 151, 162 & 163. *Boundary wall if Building and assessable.*

Held—That none of the definitions of "building line," "building of the warehouse class," "domestic building," "masonry building" and "public building" contained in Sec. 3 supported the theory that a compound or boundary wall was intended by the framers of the statute to be treated as a building.

Corporation vs. Binoy Krishna Bose.

That it had already been ruled that a detached wall* built of masonry was not a masonry building, the Judges pointing out,

(*a*) That, although the derivative meaning of the term "building" might possibly be comprehensive enough to indicate whatever is built, the various provisions in the Calcutta Municipal Act pointed to the conclusion that the term "building" was not intended to include a wall. Secs. 292, 351, 352 and 427, for instance, made it reasonably plain that the distinction between a "building" and a "wall" was pre-

* *Vide* Corporation *vs.* Joggessur ——— Page 1, 1st Volume of Legal Opinions and Rulings.

Secs. 151, 162 & 163. *Boundary wall if Building and assessable.* (concld.)

sent to the minds of the framers of the Act and that they did not regard the former as including the latter;

(*b*) That if the contrary view were adopted then a wall constructed from the plinth upwards of some material other than masonry might be held to come under the definition of hut.

That an examination of Schedule XVII showed that the rules laid down for the use of building sites and the execution of building works were never intended to apply to compound walls.

Corporation *vs.* Binoy Krishna Bose.

That the Act must be construed as a whole and that in other statutes framed for similar purposes the term "building" had not been usually interpreted in its derivative sense.

That various provisions of the Municipal Act negatived the conclusion that a boundary or compound wall is a building within the meaning of Sec. 151.

That the above view was in accordance with the interpretation put upon the statute by the Municipal authorities themselves till recently.

That the courts in construing a statute will give much weight to the interpretation put upon it at the time of its enactment and since by those whose duty it has been to construe, execute and apply it, though such interpretation has not, by any means, a controlling effect upon the courts and may have to be disregarded for cogent reasons.

[Mookherjee and Teunon, JJ. 6-9-1910. 15 C. W. N. p. 84 and 12 C. L. J. p. 476]

Assessment—Amalgamation of two premises for Valuation if authorised.

KRISTA CHANDRA CHATTERJEE

vs.

CORPORATION.

Sec. 152. *Assessment Amalgamation of Premises.*

This was an appeal in respect of the assessment of premises 77, Haris Chatterji Street amalgamated with premises 76-1. Objection was made to the valuation of the land and the building, and mainly to the amalgamation by the Corporation for purposes of assessment of the two holdings and to the inclusion of a passage to premises 76, in premises 77.

Held—That there was no section in the Act under which the Corporation had got any power to amalgamate two holdings and that the two holdings in question could not be amalgamated against the wishes of the ratepayer.

Krista Chandra Chatterjee *vs.* Corporation

That the passage leading to premises 76, could not be included in premises 77, because in the first place in the notice under Section 158 the passage was not mentioned, and in the second place if the passage was so included it may put the appellant to great trouble if he sold or gave away the two holdings to two separate individuals.

[Babu Narendra Krishna Dutt, Judge, Court of Small Causes, Sealdah. 8-3-1916.]

Assessment Appeals—Competency of Small Cause Court to deal with questions other than Valuation.

CORPORATION

vs.

PEARY MOHON ROY.

Sec. 162. *Assessment Appeals. Jurisdiction of Small Cause Court.*

Corporation *vs.* Peary Mohon Roy.

The appeal related to the question of valuation of certain premises in the city. The Corporation had valued the land at Rs. 7,694, at Rs. 400 per cottah, for an area of 14 cottahs of solid land, and at Rs. 300 per cottah for an area of 6 cottahs and odd of tank-filled land. Upon appeal, the Small Cause Court Judge, Sealdah, came to the conclusion that 5 cottahs ought to be treated as solid land at Rs. 400 per cottah and that the remainder ought to be valued at Rs. 225. He also held that it was reasonable that a certain portion of the premises distinctly demarcated should be separated from the remainder and assessed as vacant land, and he accordingly directed that from the entire area of the holding the portion fenced off should be excluded and assessed as vacant land. Against this direction the Corporation appealed.

Held—That in appeals under Section 162 it was competent to the Small Cause Court to deal with the question of valuation and that alone.

That the manner in which land is to be assesed, or whether it is or is not to be assessed as vacant land was entirely beyond the jurisdiction of the Small Cause Court, and that therefore the portion of the order directing separation of some lands to be treated as vacant land was clearly without jurisdiction.

[Mookerjee and Teunon, JJ. 21-3-1910. 15 C. L. J. p. 500.]

Private Common Drain in Bustee—Right of Municipality over it—Place lawfully set apart by the Corporation for the discharge of the drainage—Presumption.

GOBINDA CHANDRA ADDY

vs.

CORPORATION.

Sec. 299, to *Common Private Drain in Bustee.*

The petitioner was a tenant of 53, Nimu Gossain's Lane and was living in his own hut. The owner of the premises Nos. 53 to 55/1, a bustee, constructed a pipe drain, called the common house drain, in 1906 or 1907, about 500 feet long, on the north of this block of huts, connected with the municipal drain in the lane situated about 350 feet from the premises No. 53. There were two-yard gulleys made to receive the drainage from these premises and a surface drain leading from them to the gulleys. A notice was served under Sec. 299 on the petitioner requiring him to connect the surface drain with the landlord's drain on the north. The petitioner having failed to comply, was prosecuted before the Municipal Magistrate.

Gobinda Chandra Addy *vs.* Corporation

The legality of the notice was assailed on the ground (1) that the premises was not without sufficient means of effectual drainage, and (2) that there was no Municipal drain or some place lawfully set apart for the discharge of the drainage within 100 feet from some part of the premises, and (3) that the common drain passing by the premises could not be regarded as such a place as it did not belong to the Municipality. The Municipal Magistrate dismissed these contentions and sentenced the petitioner to pay a fine. He thereupon appealed to the High Court.

Held—That the private common drain of a landlord cannot be presumed to be a place lawfully set apart for the discharge of drainage.

Sec. 299, etc. *Common Private Drain in Bustee.* (concld.)

That there can be no presumption as to the statutory powers of the Corporation beyond what the law gives them.

That a place lawfully set apart for the use of the public by the Corporation must be a place over which the Corporation have acquired, by some procedure under the Statute, a right to make use of private property as a public drain.

Gobinda Chandra Addy *vs.* Corporation.

That in the absence of anything to show that the Corporation had obtained any powers to set apart such a place for the discharge of drainage, it must be regarded as the private property of the landlord, and a mere tenant cannot be called upon to alter his drain to suit the convenience of the Corporation.

[Holmwood and Fletcher, JJ. 10-11-1910. 38 I. L. R. Cal. p. 268 15 C. W. N. p. 412 and 13 C L. J. p. 327.]

Fixture—Projecting Verandah supported by Beams of the House, If a—

BARADA PRASANNO ROY CHOWDHURY
vs.
CORPORATION.

Sec. 541, Fixture.

A notice was served under Section 541 on the Plaintiff to remove a verandah which rested on the beams of [illegible] room and this was followed by an order of the Municipal Magistrate to remove the structure within [illegible]. The Plaintiff's contention was (1) that [illegible] land which this projection overhang was or [illegible] time of the notice a public street, at the [illegible] projection came into being and for a con[illegible] afterwards it was his own private land;" [illegible] was not such a structure as [illegible] section of Sec. 541.

Sec 341. *Fixture*

The Munsiff of Alipore who first heard the suit held that there was no encroachment on a public road, that the verandah as constructed was more a part of the original building than a fixture added to it, and that the action of the General Committee and the order of the Magistrate were *ultra vires*.

The District Judge, on appeal, found that the verandah was really no verandah at all but merely a broad coping; that it had been in existence for more than 60 years and that as it did no harm, the Corporation, in acting as they did, were somewhat unreasonable. Nevertheless as the strip of land under it could not be regarded as anything else but a road belonging to the Municipality, he held that the Municipality were entitled to remove it. An apeal was thereafter preferred to the High Court.

Barada Prasanno Roy Chowdhury *vs.* Corporation.

Held—That the particular projection could not be said to be a fixture attached to a building so as to form a part of the building, and that it did not come within Sec. 341 of the Act.

The decree of the District Judge was reversed and an injunction was granted restraining the Corporation from taking any proceedings under Section 341.

[Jenkins C J and Coxe, J 25-4 11. 15 C. W. N. p 730 and 13 C L. J. p. 611.]

Fixture, Removal of—Compensation, Payment of, if a condition precedent to removal.

IMADUL HUQ

vs.

CORPORATION

The party was the owner of [illegible] and 52, Chetla Road. In front [illegible] attached thereto were [illegible]

Sec. 341. *Fixture Compensation.* (contd.)

up drain. Roofs had been put over them supported by pillars sunk down into the soil between the street and the covered up drain. The Corporation had been endeavouring from about 1901 to remove these encroachments. It is unnecessary to refer to the earlier proceedings in connection with this matter. In 1907 the Corporation appealed to the High Court who held that the structure in question was a fixture and was an encroachment on a public street.

Vide pp. 4 & 5 Legal Opinions and Rulings, Vol. II.

In December, 1908, the party instituted a suit in the Court of the first Munsiff of Alipore asking that the Corporation be directed to pay Rs. 1,150 as compensation and a decree for the amount may be passed in his favour and he further claimed that so long as such compensation was not paid the Corporation was not entitled to order the demolition of the structures in question. The Munsiff's order was that "the suit be decreed for Rs. 679-11-3 with proportionate costs, etc., and that it be declared that the defendant Corporation has no right to remove the shed in question without paying to the plaintiff the compensation decreed." Against this order the Corporation appealed to the District Judge of 24-Pergunahs on the ground

Imadul Huq *vs.* Corporation.

(1) that in law the payment of compensation could not be a condition precedent to the removal of the encroachment,

(2) that the question of restricting the Corporation from removing the encroachment before compensation was paid had already been a matter directly at issue between the parties in a previous suit,

(3) that the ordinary Courts of original jurisdiction had no power to adjudicate upon the question of compensation as between the Corporation and the parties suffering damage by the exercise of the Corporation's powers under the Calcutta Municipal Act, and

(4) that the compensation awarded was excessive.

Sec. 341. *Fixture Compensation.* (concld.)

The District Judge decided the first two points in favour of the Corporation. As regards the 3rd point he held that it was laid down distinctly in Section 617 that all cases of dispute regarding the amount of compensation shall be determined by the Court of Small Causes, that the question whether the plaintiff was entitled to compensation was a pure question of fact and not a question of title, and that the contention that the right to compensation as well as the amount of it was in dispute and that the Small Cause Court had no jurisdiction to try a question of title was entirely without weight. He came to the conclusion that the party was entitled to a declaration that on the demolition of the fixtures he was entitled to compensation, the amount of such compensation being determined by a Court of competent jurisdiction.

The party appealed to the High Court against the decision of the District Judge.

Imadul Huq *vs* Corporation.

Held—That the fixture which was an encroachment on a public street was one coming within the terms of Clause 3 of Sec. 341 inasmuch as it was erected before the 1st of June 1863.

That the party's contention that he was entitled to be paid compensation before he was put under any obligation to remove the fixture was based on an erroneous reading of Clause 3 of Sec. 341.

That the words contained in this Clause were capable of but one meaning, that is that compensation is only to be paid to a person who has suffered damage by the removal or alteration, in this case there had been no removal and therefore no damage.

That there must be removal resulting in damage before compensation is payable and it could not be suggested that the payment of compensation was a condition precedent.

The appeal was dismissed with costs.

[Jenkins, C. J. and Harrington, J. 22-11-12.]

Fixtures—Order for demolition—Limitation period in Sec. 631 whether applicable.

SARAT CHANDRA MUKHERJEE
vs.
CORPORATION.

Secs. 341, 450 & 631. *Fixture Demolition Limitation.*

In January, 1907, a notice under Section 341 was served on the petitioner calling on him to remove a masonry platform at 137, Corporation Street which was alleged to be an encroachment on a public street. On failure to comply with it, proceedings were instituted under Sec. 450 in October 1907. In October 1909 the Municipal Magistrate held that the platform in question was a fixture and that it caused an encroachment on a public street. He directed that it be demolished by the Chairman at the expense of the owner who thereupon appealed.

Sarat Chandra Mukherjee *vs* Corporation.

It was urged on his behalf that as he had failed to comply with a requisition lawfully made, he became liable under Sec. 574 to a penalty of two hundred rupees; that the application to the Magistrate under Sec. 450 was a complaint and the Magistrate could either have punished him under Sec. 574 which he did not or made an order under Sec. 450 which he did; that as the petitioner was liable to punishment the proceedings were subject to the limitation provided in Sec. 631.

Held—That Sec. 631 had no application to the order of the Magistrate and that the order of demolition was not illegal on the ground of having been made after the limitation period prescribed. Sec. 574 may make non-compliance with a requisition under Sec. 341 (1) an offence, but if it does, the offence must be tried according to law in the regular way *i e.*, on a complaint which in this case would be such as is mentioned in Sec. 4 of the Criminal Procedure Code. No steps were taken to

this end in the present case and therefore Section 631 has no application. A special remedy provided by Sec. 450 was applied; but there is no necessary connection between this remedy and the punishment of an offence. The two things are quite distinct; the limitation in Sec. 631 applies to the one and not to the other.

Secs. 341, 450 & 631. *Fixture Demolition Limitation.* (concld.)

[Stephen and Carnduff, JJ 18 2-1910. I. L. R. 37 Cal. p. 384. 14 C. W N. p 591.]

Buildings, Additions and Alterations to—Refusal of sanction to plan—Suit against Corporation to stop demolition—Duties of Chairman, General Committee and Corporation.

BHOLA RAM CHOWDHURY
vs.
CORPORATION.

In 1903 the Plaintiff obtained sanction in respect of 199, Harrison Road which was treated as a domestic building. Subsequently with a view to make certain additions and alterations he submitted another plan for sanction and urged that the building was of the warehouse class. The Chairman refused sanction; the plaintiff thereupon appealed to the General Committee who upheld the Chairman's decision. Thereafter the Plaintiff instituted a suit in the High Court against the Corporation amongst other things for a declaration that his building was a building of the warehouse class under the Act and that the refusal to sanction was irregular, illegal and wrongful. It was urged in the course of the hearing on behalf of the Plaintiff that the General Committee under the Act was not a body corporate and that the Corporation was the proper party to be

Secs. 370, 371, 375 & 377. *Building Sanctions G. C. Final Authority.*

Bhola Ram Chowdhury vs. Corporation.

Secs 370 371, 375 & 377. *Building Sanctions G. C. Final Authority.* (concld.)

sued and in support of this view the following among other cases were cited. Corporation* *vs* Shyama Charan Pal, and Tullaram* *vs.* Corporation.

On the other hand the case of Jogendra Nath Mukhuti† *vs* Corporation was cited on behalf of the Corporation.

Bhola Ram Chowdhury *vs* Corporation.

Held—That the Calcutta Municipal Act confers the right to approve or reject plans of proposed buildings on the Chairman from whose decision an appeal lies to the General Committee whose decision on the subject is final.

That the Corporation have no control over the General Committee with regard to matters specifically delegated by the Act to that body.

That a suit would not therefore be against the Corporation for an injunction.

[Fletcher, J. 22 3-1909. 13 C. W N p 740 & 1 L. R 36 Cal p. 671]

* *Vide* Legal Opinions and Rulings, Vol I, pp 25 & 176.
† *Vide* Legal Opinions and Rulings, Vol II, p 2.

Application for permission to execute a work neither refused nor granted—Remedy of Applicant—Imprisonment in default of payment of Fine if legal—Offence under Municipal Act whether falls under Sec. 64 of Penal Code.

BASANTA KUMARI DEBI
vs.
CORPORATION.

Secs. 374, 376 & 580. *Demolition order, Imprisonment in default of Fine.*

The petitioner was prosecuted for making certain additions and alterations at premises 30, Ram Bagan Lane in deviation from the sanctioned plan and in contravention of certain Rules. The Municipal Magistrate ordered demolition of the objectionable portions within two months. This order not having been complied with, the petitioner was prosecuted under Section 580 and was

fined Rs. 20. in default to undergo simple imprisonment for 20 days. She thereupon moved the High Court on the ground (1) that there was no sanction or refusal under Section 371 and that the order of demolition was therefore illegal and (2) that the alternative sentence of simple imprisonment was contrary to law.

Secs 374, 376 & 580 *Demolition order, Imprisonment in default of Fine.* (concld)

Held—As regards the 1st point, that there was no defect in the proceedings and if she was dissatisfied with the demolition order an application for revision should have been made within two months of the date on which it was passed.

Basanta Kumari Debi *vs* Corporation.

As regards the second point, that there was no authority under the Calcutta Municipal Act to impose imprisonment in default of payment of fine, at any rate for such offences to which a daily penalty is assigned in addition to the substantive fine, because if a man were put in jail he could not very well be asked to pay a daily fine for not carrying out the direction: that these technical offences which carry penalties in the shape of fines are not to be classed as offences under Sec. 64 of the Penal Code and that Sec. 580 of the Municipal Act precludes any alternative sentence of imprisonment.

[Holmwood and Sharfuddin, JJ 10-2-11 15 C W. N. p 906.]

Buildings duly sanctioned but not yet erected—Subsequent Additions proposed—Applicability of Sec. 391—Irregularity in Application to Magistrate

KISORI LAL JAINI

vs

CORPORATION.

Secs. 391 & 102. *Buildings. Additions to a proposed Building.*

In 1908 sanction was accorded by the District Building Surveyor to the erection of a certain building. Subsequently another application was made for sanction to an addition to the building as originally proposed and this was likewise granted by the District Building Surveyor. No building operations of any kind were begun

Secs. 391 & 102 *Buildings. Additions to a proposed Building.* concld)

till after the second application had been disposed of. It was contended on behalf of the Corporation that the District Building Surveyor had no authority to grant the second sanction as the case was one of sanction to an addition to a building falling under Section 391 of the Calcutta Municipal Act and therefore the only authority by which the sanction could have been granted was the General Committee. An application was made to the Municipal Magistrate who passed an order for the demolition of the building. Thereupon the petitioner appealed. Incidentally the point was urged that the Secretary to the Corporation had no power to make the application to the Magistrate.

Kisori Lal Jaini *vs.* Corporation.

Held—That Section 391 applies only to alterations of and additions to *existing* building and that a supplementary application proposing an addition to an already sanctioned plan of a contemplated building does not fall within its scope.

That any irregularity in an application presented with the sanction of the General Committee by its Secretary to the Magistrate would be cured under Sec. 102 (1) (c).

[Carnduff and Richardson, JJ. 30-3-1910. I. L. R 37 Cal. p. 585 and 12 C L. J p 24.]

Bustee Land—Owner of Bustee—Liability of actual owner to carry out improvements when his Estate is under a Receiver.

CORPORATION

vs.

HAZI KASSIM ARIFF BHAM.

Sec. 408 *Bustee Improvements. Owner's duty when Estate under Receiver.*

Hazi Kassim was served with a notice under Sec. 408 to carry out certain improvements in the bustee at 7, Wellesley Street. He did not object to the notice, but failed to carry out its requisitions and was therefore prosecuted.

Sec. 408 *Bustee Improvement. Owner's duty when Estate under Receiver.* (concld.)

It was contended on behalf of Hazi Kassim that the property was in the hands of a Receiver appointed by the High Court and that it was not possible therefore to comply with the notice; that the word "owner" connotes certain rights and privileges which Haji Kassim was unable to exercise in this case owing to the appointment of a Receiver.

It was argued on behalf of the Corporation that the accused as owner of the bustee was bound to carry out the requisitions and that he should have taken proper steps to move the High Court for directing the Receiver to carry out the requisitions.

A reference was made to the High Court by the Municipal Magistrate as to whether the accused was bound to move the High Court for taking steps for the carrying out of the requisitions of the notice, or whether the Corporation should have, with the leave of the High Court, served the notice under Sec. 408 upon the Receiver.

Corporation *vs.* Hazi Kassim Ariff Bham

In *W R Fink*, Receiver to the Estate of Haji Kassim Ariff* vs. *Corporation* it was held that a "Receiver" is not the owner of the premises he holds as Receiver within the definition of the term as contained in the Municipal Act and that he is not an agent or trustee in that behalf.

* *Vide* Legal Opinions and Rulings Vol. I, p. 1.

Held—That it was incumbent on the owner to request the Receiver to comply with the notice after taking the directions of the Court and on his failure to comply, to apply to the High Court making the Receiver a party to his application.

[Casperz and Sharfuddin, JJ. 12-6-11. 38 I. L. R., Cal. p. 714 and 15 C. W. N. p. 1000.]

Using a house found unfit for human habitation—Joint penalty imposed on several accused if legal

BHAIRAB CHANDRA KOLAY
vs.
CORPORATION

Secs. 444 (2) & 574. *Using condemned House. Joint Penalty.*

The petitioner who was the owner, and another who apparently was occupying the building with him were prosecuted for disobeying an order under Sec. 444 (2) prohibiting them from using a house found to be unfit for human habitation, and were sentenced by the Municipal Magistrate to pay jointly a fine of Rs. 50.

Held—That the act of disobedience in each of the accused was a separate offence, and that the passing of the joint penalty was illegal.

[Harrington and Teunon, JJ 9-6-1910 I. L R 37 Cal. p. 895 and 14 C W. N p. 911.]

Demolition Order—Acceptance of Rates in respect of premises if Acquiescence in Disobedience of Order

LUCHMI NARAYAN MAHTO
vs.
CORPORATION.

Sec. 449 *Demolition Order. Acceptance of Rates.*

The order to demolish the building was made so long ago as the 25th September, 1905. Since then the petitioner had been endeavouring to induce the Corporation not to insist on demolition but to come to terms with him, and on certain considerations to allow him to disregard the order. These negotiations had not ended in any agreement between the parties. Meanwhile rates had been levied and accepted in respect of the premises,

Sec. 449. *Demolition Order. Acceptance of Rates if Acquiescence.* (concld.)

and prosecution for failure to comply with the demolition order was proceeded with with the result that on the 8th March 1910 the petitioner was sentenced to pay a fine of Rs. 10 a day for 20 days. The petitioner thereupon moved the High Court, his main contention being that the fact that the Corporation had realised the rates amounted to an acquiescence in the existence of the building and that the Corporation were therefore precluded from enforcing the demolition order.

Luchmi Narayan Mahto *vs.* Corpoation.

Held—That if the petitioner's argument were well founded it would come to this that as long as he could keep the negotiations open between the Corporation and himself and could avoid complying with the order by amusing them with offers, so long he would be entitled to escape the payment of any rates in respect of the building ordered to be demolished, and that such a proposition was unreasonable.

That the acceptance by the Corporation of rates in respect of premises which had been ordered to be demolished under Sec. 449 does not amount to an acquiescence by the Corporation in the disobedience of the petitioner to the order to demolish.

[Harrington and Teunon, JJ. 27-5-1910. I. L. R. 37 Cal. p. 833 and 14 C. W N. p. 912.]

Sale of Adulterated Food by Servant, Liability of Master —Sale by Partner, Liability of Co-partner—Seller, Meaning of.

SEW KARAN

vs.

CORPORATION.

Secs. 493, 507 & 574. *Sale of Adulterated Food.*

Sew Karan was a commission agent for certain producers of ghee up-country. The ghee was sold in Calcutta in certain shops which went by the name of Lal Chand Sew Karan and the license for wholesale dealers in ghee at 2, Ram Kumar Rakhit's Lane and for selling

Secs 495, 507 & 574. *Sale of Adulterated Food Partner's and Servant's Liability (contd.)*

ghee at 9, Ram Kumar Rakhit's Lane was in the name of Lal Chand Sew Karan The Health Officer instituted proceedings against Lal Chand Sew Karan. The finding on the evidence was that Lal Chand Das was the hand that actually sold the ghee to the Inspector. The Municipal Magistrate however treated the case as if Lal Chand was the servant of Sew Karan and convicted Sew Karan sentencing him to pay a fine of Rs. 100. The petitioner thereupon appealed to the High Court. It was argued on his behalf that there was no evidence that Lal Chand was the servant of the petitioner, that on the other hand the license showed that it was one of partnership and the actual seller was the partner of the accused, and hence the prosecution against one of the partners was not maintainable.

Sew Karan *vs* Corporation

Held—That Sec. 495 of the Calcutta Municipal Act, like the corresponding section of the English Statute, is positive in its prohibition of the sale of adulterated articles, and when a servant sells such articles it is the master, firm or the beneficial owner who is liable to punishment, and this would be so even when the servant adulterates the articles himself and sells without the knowledge or connivance of the master, firm or owner.

That where the person who sells is one of two partners of the firm, the conviction of the other partner would be equally legal.

That the Legislature intended that the beneficial owner of the article should be responsible for its purity, for, the expression "seller" in Sec. 507 means the owner of the shop or the person who has the license to sell goods or who carries on business through his servant or agent and he is contrasted with the agent actually selling the article. Further, the fine which may be imposed under Sec. 574 is Rs. 100 for the first offence and Rs. 500 for any subsequent offences. It

was perfectly clear that this must have reference to the master and not to the servant, because it would not always be the same servant who would be in the shop selling the article, and by changing his servant every week a dishonest proprietor could continue to sell adulterated goods without incurring any further penalty.

Secs 495, 507 & 574. *Sale of Adulterated Food. Partner's and Servant's Liability.* (concld)

[Holmwood and Sharfuddin, JJ 8-2-1912. 16 C. W N. p. 455.]

Bye-laws under Sec 559 (18) regarding Encroachments—Validity of Clause (1)—Limitation—Continuing breach, offence of, if created by the bye-law.

NARAIN CHANDRA CHATTERJEE
vs.
CORPORATION

On the 3rd August, 1908 a notice was served on the petitioner under Clause* (1) of the Bye-laws under Sec. 559 (18) requiring him to remove two masonry pillars at 31-2, Bagh Bazar Street on the ground that they were encroachment on the public street.

Secs. 559 (18) 561 & 631. *Encroachment Bye-laws. Continuing Breach if an offence under Clause 1.*

On failure to comply with the notice the petitioner was prosecuted before the Municipal Magistrate on the 8th February, 1909. The Magistrate held that an offence for breach of the bye-law had been committed and fined the petitioner Rs. 5. Against this order the petitioner moved the High Court.

Narain Chandra Chatterjee vs. Corporation.

Held—That a bye-law must conform to the provisions of the enactment under which it purports to be made;

That Clause (1) of the bye-laws, so far as it relates to obstruction, may be conceded to come within the

* See Appendix A.

Secs 559 (18), 561 & 631. *Encroachment Bye-laws. Continuing Breach of an offence under Clause 1. (concld.)*

provisions of Sec 559 (18) except perhaps so far as it purports to deal with obstruction whether before or after the passing of the bye-laws.

That the clause is *ultra vires* in so far as it purports to create a continuing breach which is outside of and fails to comply with the provisions of Section 561, Clause (b). This section contemplates a notice following a breach whereas under the bye-law the breach arises upon notice and there is no provision in it for a further notice following the breach.

That as complaint was made more than 3 months after the expiration of the period in the notice, prosecution was barred under Section 631 and the conviction and sentence were therefore bad in law.

[Jenkins, C J and Woodroffe, J 17 11 1909 I L R 37 Cal. p. 545, 14 C. W. N 614 and 10 C L J. p. 623.]

Election—Claims and Objections to Voters' Lists, Time, Place and Officer for lodging of—Mandamus for non-performance of statutory duty.

In *re*

MR. ROMESH CHANDRA SEN

Sch. IV, Rule 8. *Election Claims & Objections, Lodging of.*

Under the Calcutta Municipal Act, Schedule IV, Rule 8, the notice of any claims and objections to the Voters' List must be filed with the Chairman on or before the 1st January. Under Sec. 18 of the Act the Chairman delegated his duties relating to the elections held in March 1912 to the Deputy Chairman who kept the Election Department open on the 1st and the 2nd January and settled the lists of voters irrespective of whether the claims and objections were lodged on the 1st or 2nd.

Re Mr. R. C. Sen

Messrs. I. J. Cohen and D. J. Cohen made over a number of claims to the Secretary to the Corporation at

Sch. IV, Rule 8. *Election Claims & Objections, Lodging of.* (concld.)

his residence in the Corporation Buildings in the evening between 5 and 6 on the 1st January asking him to receive them as the Election Department was closed. The next day about noon Messrs. Cohen came to the Secretary and took these papers to the Election Department. Upon this, Mr. Romesh Chandra Sen obtained a Rule calling upon the Chairman to show cause why he should not publish a revised list of voters for Ward No. 18 by rejecting the claims, objections and applications filed by Mr. Cohen on the 2nd January.

Held—That there was nothing in the Act to suggest that the Chairman or his Deputy could extend the time beyond the 1st January for lodging claims and objections.

Re Mr. R. C Sen.

That the Secretary was not the proper person nor his residence the proper place for the lodging of objections, etc.

That therefore the claims and objections filed by Messrs. Cohen were not properly lodged and

That the omission of a statutory officer to perform his duties as to the settlement of the Election Roll in the manner provided by the Act amounted to "forbearing to do something that is consonant to right and justice" as contemplated in Section 45, Proviso (c) of the Specific Relief Act and that in such cases the Court could issue an order in the form of *mandamus*.

[Fletcher, J. 19-2-1912. 16 C. W. N. p. 472 and 15 C. L. J. p. 494.]

Election—Rules 9 and 10 (9), Schedule IV—Representation of Companies, etc—"One individual person," Meaning of—Cumulative votes, Limit set by Sec 50.

In *re*
MR NISITH CHANDRA SEN.

Sch. IV, Rules 9 & 10 (9) & Secs 38 & 50 *Election Representation of Companies etc., Cumulative Votes*

In connection with the General Election held in March, 1912, Babu Priya Nath Mallik a candidate for election as a Commissioner for Ward No. 22 made an application under Rule 9 of Schedule IV that his name be entered in the Voters' List for the Ward as the person duly qualified to vote on behalf of a large number of companies, firms and Hindu joint families. This was opposed by Mr. Nisith Chandra Sen who was also a candidate for election for the same Ward on the ground that such representative of the company, firm, etc., must himself be a member thereof which Babu Priya Nath Mallik was not. Mr. Sen obtained a rule from Mr. Justice Fletcher calling on the Chairman to to show cause why he should not prepare a revised list of voters for Ward No. 22 by rejecting the applications filed by Babu Priya Nath Mallik.

Re Mr. N. C. Sen.

The Rules bearing on the point are Rule 9 and Rule 10 (9) of Schedule IV and the whole question turned on what meaning is to be attached to the word "individual" in these Rules. The argument on behalf of the Chairman and of Babu Priya Nath Mallik was that "individual" only meant "single" and that therefore anybody could represent a company, etc., although he may have no connection with it. It was contended on behalf of Mr. Nisith Chandra Sen that if the above interpretation were correct the word "one" was unnecessary in the Rule and that the word "individual" indicates that the person belongs to the association, etc.

Sch. IV, Rules 9 & 10 (9) & Secs. 38 & 50 *Election Representation of Companies, etc., Cumulative Votes.* (contd.)

It was held by Mr. Justice Fletcher that the statute could not have intended to authorise the Chairman to place on the list an individual who had no connection with the association he was to represent and who had not even heard of the association or family; that if such a proposition were intended it would require extraordinarily strong words in the statute. He came therefore to the conclusion that, in the absence of clear words in the statute to indicate the contrary, the word "individual" would have the ordinary natural meaning *viz.*, a person belonging to a class and that therefore the "individual" claiming to represent a company, etc., has got to be a member thereof.

Incidentally the question was raised as regards Sec. 50 which provides that no person shall give more than eleven votes in any one ward. Mr. Justice Fletcher's finding was that the statute did not intend in the case of a Hindu joint family or other association that one gentleman should get hundreds or perhaps thousands of votes in any one ward, and that the intention of the statute was that a member of a Hindu joint family, etc., might be placed on the electoral roll as representing the family or association.

Re Mr. N. C. Sen.

The Rule was made absolute with costs. Against this order Babu Priya Nath Mallik appealed.

Held—That the expression "any one individual person" found in Rule 9 should be read together with, and controlled by the expression "association of individuals" which immediately precedes it.

That, so read, the field of selection for representation would be limited to those individuals of which the several associations indicated in the Rules are composed.

That this view of the Rule would account for the somewhat unusual expression "any one individual person" which would have been unnecessary had the words

Sch. IV, Rules 9 & 10 (9), Secs. 38 & 50. *Election Representation of Companies, etc., Cumulative Votes.* (concld.)

borne the unlimited significance for which Babu Priya Nath Mallik contended, and that it would provide a safeguard against the concentration of voting power in one person.

That it was contrary to public policy and detrimental to the public interest that persons should give their votes without reason to some stranger before even the nomination of candidates, and that such candidate should go to the poll with a large number of votes in his pocket to be cast by him in favour of his own candidature.

Re Mr. N. C. Sen.

It was pointed out by Mr. Justice Woodroffe that the difficulty would not have arisen if only the word "members" had been inserted.

[Jenkins, C.J and Woodroffe, J 29-2-1912. 15 C L J. p 468]

Dangerous and Offensive Trades License for—Iron in Schedule XVIII (8) whether inclusive of Steel.

GANGA NARAIN PAL

vs.

CORPORATION.

Sch. XVIII (8). *Dangerous & offensive Trades Iron & Steel.*

The petitioner was prosecuted before the Municipal Magistrate for storing iron plates, etc. at 80-1, Pathuria Ghatta Street without a license under Section 466. His contention was that in Schedule XVIII (8) only iron was specified and that as the articles were of steel he was not bound to take out a license. The point for decision was therefore whether the expression "iron" in Schedule XVIII (8) included "steel". The Magistrate after quoting several authorities held that steel was only a form of iron. He further pointed out that the only meaning which could be attached to the word iron in Schedule XVIII (8) so as to carry out the object

Ganga Narain Pal vs. Corporation.

of the law was that it was used as a generic word and included all descriptions of iron. It would have been obviously unjust and was therefore presumably not intended that a person storing cast-iron or wrought-iron in any premises without a license under Section 466 would be liable to punishment and that a person storing steel under similar circumstances would not be so liable. In this view the Magistrate convicted the petitioner and sentenced him to pay a fine of Rs. 25. The petitioner thereupon moved the High Court.

Sch. XVIII (8). *Dangerous & offensive Trades. Iron if Steel.* (concld.)

Held—That "iron" does include "steel".

[Mookherjee and Vincent, JJ. 31-7-1909. 10 C L. J. p. 486]

Ownership of Land, Dispute. re—*Billon's Map if admissible in Boundary Disputes—Non-attendance of Witness—Process to compel attendance.*

UPENDRA NATH GHOSE & ANOTHER
vs.
CORPORATION.

This was a dispute regarding the ownership of a small plot of land in Bhowanipore.

Ownership of Land Billon's Map if admissible.

The allegation of the plaintiffs was that the land in question was part of a holding of theirs in the Government Estate of Panchanagram and that in any case they had been in possession of the same for many years and had acquired a title to it by adverse possession whether the land was originally included in their holding or not.

The contention on behalf of the Corporation was that the land in dispute had been measured as part of a public road in certain proceedings under the Survey Act and had been shown as such in Billon's map.

Upendra Nath Ghose & another vs. Corporation.

Ownership of Land Billon's admissible. (cont'd.)

In the Munsiff's Court a servant of the Municipality was summoned at the plaintiffs' instance to produce certain documents which the plaintiffs maintained would support their case of adverse possession of the land, but he failed or declined to attend and an application made by the plaintiffs for a warrant to compel his attendance was rejected by the Munsiff on the ground that no such application could be allowed as witnesses had already been examined and the plaintiffs' case had nearly been completed.

The Munsiff did not accept the evidence of title adduced by the plaintiffs and did not find any proof of adverse possession and dismissed the suit.

The petitioners thereupon appealed to the District Judge who came to the finding that the land had not been in their possession for 12 years. He expressed the opinion that the plaintiffs had deliberately suppressed their title deeds and produced other deeds containing boundaries which were obviously erroneous.

Upendra Nath Ghose & another vs. Corporation.

The next appeal was to the High Court and was heard by Mr. Justice Vincent Two points were pressed in favour of the plaintiffs, (1) that Billon's map was not a map prepared under the authority of Government as the Sovereign power but one prepared by Government as landlord in its own interest and that therefore it had been wrongly admitted in evidence and (2) that the Court of the first instance had improperly refused to take steps to enforce the attendance of an important witness for the plaintiffs.

The learned Judge held that the map in question though not possibly admissible as a public record was undoubtedly admissible under Section 13 of the Evidence Act; that considering the stage to which the case had advanced when the application for a warrant to compel the attendance of the defaulting witness was made the

Munsiff's order rejecting such application was proper. He dismissed the appeal. Against this decision the petitioners appealed.

Ownership of Land Billon's Map if admissible. (concld.)

Held—That Billon's map was admissible, if not under Sec. 83, still under Sec. 13 of the Evidence Act, and that the value to be attributed to it, when admitted, was a matter to be determined by the Court of fact.

That the conduct of the Municipal servant who failed to attend was most reprehensible and that the reasons under which the Munsiff rejected the application for a warrant were not satisfactory.

The decrees of the lower Courts were set aside and it was ordered that there should be a re-hearing after compelling the witness to attend and to produce the documents.

Upendra Nath Ghose & another *vs.* Corporation.

[Jenkins C. J and Chatterjee, J. 24-8-11. 16 C W. N p. 116]

PART II.

Legal Opinions.

PART II.

Legal Opinions.

Building of the warehouse class—Building partly used as shops and godowns and partly for residential purposes, how to be treated—Abutment on two roads, one in a notified area and the other in a non-gazetted locality, effect of

CASE.

(Submitted by the parties.)

Secs 3 (4) & 367 *Building of Warehouse class*

Messrs. Tara Chand Ghoneshamdas, want to pull down most part of the existing building, partly four storeyed and partly three-storeyed, and a small portion one-storeyed at premises No. 160, Harrison Road, and to erect a new structure four storeys high in its place as per plan submitted.

They submitted the plans first on the 4th day of April last and asked for sanction to the proposed building as a "Building of the warehouse class" as defined in clause (4) of Sec. 3 of the Calcutta Municipal Act, the erection of "Building of the warehouse class" having been declared by Notification in the *Calcutta Gazette* under Sec. 367 of the Act, to be allowable in (among other localities) Harrison Road.

Those plans were refused on the 18th April, 1911, by the District Building Surveyor on the following grounds as per his memo. No. II B 74 and against each item is mentioned what action or reply the applicants took or gave with reference thereto:—

1. Plan of each floor should be given and purpose for which each room of every floor will be used should be noted in the plan (No rule was quoted in support of this objection).	This was complied with by the applicants.

CASE.—(*contd.*)

Secs 3(4) & 367. *Building of Warehouse class* (contd.)	2 Plan is incorrect as the existing covered spaces are shewn as open in the plan	The plan related to the proposed structure, so applicants ignored this objection
	3 Height of the building abutting on Roop Chand Roy's Street will intersect the lines drawn at an angle of 45° (Rule 2 of Schedule XVII.)	The applicants pointed out that this was a "Building of the ware-house class" and the word "45°" in Rule 2 should be read as "56½°" *vide* Rule 23 (1), it being within the declared area
	4 Front elevation should be submitted for approval of the architectural features.	Front elevation was supplied

The memo. concluded by saying that the case will be referred to Deputy Chairman for orders whether the building is to be treated as a "Building of the warehouse class" and Rules 17, 22 and 24 of Schedule XVII are to be relaxed.

The plans were resubmitted with letter together with a front elevation and plans of each floor, etc., on the 16th May, 1911. Thereupon a reference was made by the District Building Surveyor to the Deputy Chairman as to the proposed building being a "Building of the warehouse class" or not. Meanwhile, an alteration in the Building Rules relating to "Buildings of the warehouse class" was made with the sanction of Government to the effect that every such building must have a cart passage so that carts may go inside the premises instead of being loaded or unloaded on the public street.

The Deputy Chairman placed the matter before the Chairman with a suggestion that a passage 8 feet wide for carts should be insisted on and the Chairman agreed to the same. Thereafter the District Building Surveyor again sent the plans back on the 8th June 1911, with the following remarks :—

(1) The passage affording access to carts inside the premises should be at least 8 feet wide.

CASE.—(*contd.*)

(2) On resubmission of corrected plans, the case will be placed before the Roads, etc., Sub-Committee for approval of the architectural features. Secs. 3(4) & 367. *Building of Warehouse class.* (contd)

The applicants resubmitted the plans on the 7th July last with a letter of that date. But a few days thereafter their Gomasta with their Attorney interviewed the present Deputy Chairman and agreed to make a passage 8 feet and to make a few minor alterations with the view to expedite sanction. A modified plan was submitted on the 19th day of July last. The Deputy Chairman put up the same before the Roads, etc., Sub-Committee for approval of the architectural features. At the meeting, however, Mr. Rutter appeared on behalf of a neighbouring owner to oppose the sanction and the Deputy Chairman then read a note which had apparently been drafted before the applicants' man saw him as aforesaid, as it clearly did not refer to the modified plan.

After one adjournment the matter came up before the Roads, etc., Sub-Committee again on the 31st July last before whom the applicants appeared by their Attorney pursuant to Notice and the Attorneys for two neighbours also appeared to oppose the sanction of the plan. It then appeared that though the matter came up before the Committee for approval of the architectural features, the Deputy Chairman's note contained various subjects which could not come before the Committee. The applicants' Solicitor pointed out that the Committee could not go into all those questions, but the Deputy Chairman explained that he felt doubtful as to whether it was a "Building of the warehouse class;" hence he had made a reference to the Committee. The applicants' Solicitor objected to the reference as being wholly irregular and *ultra vires*. However, the Committee went into the question and their discussion was confined to whether

CASE.—(*contd.*)

Secs 3 (4) & 367. *Building of Warehouse class.* (contd.)

the building was a "Building of the warehouse class" or not. Finally it was decided to obtain the opinion of Mr. S. P. Sinha on a joint case, at the expense of the applicants.

The question upon which the Committee desire to take Counsel's opinion is whether the building in question would be a "Building of the warehouse class."

The applicants rely on the definition of the term in the Act, clause (4) of Sec. 3 and to the cubical extent of the building, which is much more than 1,50,000 c. ft., being about 5,42,000 c. ft., and it is not a dwelling house, inasmuch as only the rooms on the topmost storey are intended for residence and therefore the building is neither wholly or principally constructed for human habitation *see* definition of dwelling-house, clause (18) Sec. 3.

The Committee contend, in the first place, that the building is, properly speaking, not one building but several detached buildings with passages between them, which the applicants seek to connect by means of bridges, but notwithstanding such bridges the several buildings cannot be considered as one building nor can the aggregate cubical extent of the said several detached buildings each of which taken by itself comes to less than 1,50,000 cubic feet, be taken to satisfy the minimum cubical extent of a "Building of the warehouse class" as laid down in the definition.

Secondly, the Committee contend that a building having shops on the ground floor, godowns on the second storey, offices on the third storey and dwelling rooms on the fourth storey, as shewn in the plans in question, cannot be said to be a "Building of the warehouse class" irrespective of the cubical extent, but that such a building should be a domestic building although it may or may not be a "dwelling house."

CASE.—(*contd.*)

Secs. 3 (4) & 367. *Building of Warehouse class.* (contd.)

In answer to the above the applicants contend as follows :—

With regard to No 1. Secs. 370 to 377 relating to the sanction of Buildings and Building sites, and Rule 30 in Schedule XVII contemplate the unit of a building site to be land comprised within one premises bearing a premises-number in the Assessment Book, and a building is the building on one site, whether such building be continuous or detached. Familiar instances are afforded by Hindu dwelling houses consisting of outer apartments, inner apartments, coach-houses etc., and in the European quarter of the town. houses consisting of the main building or buildings and out-houses, coach-houses, servants' quarters, etc. If these had been meant to be treated as separate buildings, the law would have rendered a separate application for sanction necessary in each case, that is, the main building or buildings separately, and the out-houses separately. But that is not so. Apart from that the building in the present case cannot, without an undue stretch of the imagination, be called separate buildings. However, the bridges remove the last vestige of a doubt, if any could still be entertained, in the matter. The applicants wanted to put up gratings over the 6 feet passages, but the Deputy Chairman did not like the idea. In any case, however, the applicants can join the several portions of the building together into as homogenous a mass as anybody could desire, if that is what the law requires.

With regard to No. 2. In the Act buildings are first broadly divided into two classes, namely, "masonry buildings" and "huts." Masonry buildings are subdivided into (1) Public buildings, (2) Buildings of the warehouse class, and (3) Domestic buildings, which include a dwelling-house. These three classes of buildings, as also a dwelling-house, have been defined in the

CASE.—(*contd.*)

Secs. 3 (4) & 367. *Building of Warehouse class.* (contd.)

Act. There cannot be any confusion between a "public building" and any other class of building. The building in question is not a "public building" nor a "dwelling house," inasmuch as it is neither wholly nor principally used or intended for human habitation. It must therefore be either a "building of the warehouse class" or a "domestic Building" other than a dwelling-house. Now, having regard to the definition of these two terms, excluding a dwelling house, the line of demarcation between the two can only be the bulk of the building, those (not being "Public buildings" or "Dwelling houses") having a cubical extent of 1,50,000 c. ft. or over being "Buildings of the warehouse class" and those having a cubical extent below that figure being "Domestic buildings."

Counsel will be pleased to express his opinion on the following :—

(1) Is the building in this case such as comes within the category of "any other masonry building exceeding in cubical extent 1,50,000 c. ft." as stated in clause (4) of Sec. 3, or is it to be considered a group of separate buildings, each being less than 1,50,000 c.ft., in cubical extent, the aggregate of which cannot be taken to bring the same within the category aforesaid?

(2) Should the answer to the above be against the applicants, is it not open to them to cover up all or a major portion of the 6 ft. passage and thereby bring it within the category aforesaid.

(3) Is the building in question a "building of the warehouse class" as defined in the Act or is it a "domestic building," independently of the questions Nos. (1) and (2) ?

(4) Having regard to the Rules 30 and 31 in Schedule XVII, and the facts of the case, is not the Chairman

CASE.—(*concld.*)

debarred from raising the question as to the class of the building after the memo. of the District Building Surveyor No. B/II 369, dated 8th June, 1911? Secs. 3 (4) & 267. *Building of Warehouse class* (contd.)

(5) Were the proceedings before the General Committee legal or were they *ultra vires*?

OPINION.

(*Obtained by the parties*)

1. In our opinion the building is to be considered one building and not detached buildings.

2. Question does not arise.

3. In our opinion the building in question is a building of the Warehouse class.

4. & 5. Questions 4 & 5 raise questions of considerable difficulty and the same, in view of our opinion, do not arise in this case, and we do not desire to express any opinion for the present, regard being had to the limited time at our disposal.

7th. September 1911.

S. P. SINHA.
B. C. MITTER.

CASE.

(*Submitted by the Corporation.*)

Messrs. Tara Chand Ghansam Das, merchants of Calcutta, have taken a lease of the premises bearing Nos. 160, Harrison Road and 10, Roop Chand Roy's Street, with liberty to make additions and alterations thereto.

The building bearing these two numbers runs from Harrison Road on the north to Roop Chand Roy's Street on the south. The two numbers were sometime ago (ir

CASE —(*contd.*)

Secs 3 (4) & 367 *Building of Warehouse class.* (contd.)

1898) amalgamated into one No. 160, Harrison Road, and the purpose for which it was so amalgamated would appear hereafter.

The main portion of the buildings Nos. 160, Harrison Road and 10, Roop Chand Roy's Street, now 160, Harrison Road abuts on Harrison Road to a certain depth to the south, and behind this were a tiled shed and some buildings of the applicants, extending towards Roop Chand Roy's Street, which have been demolished by the applicants.

Harrison Road is a big road and is used for purposes of trade and residence. Roop Chand Roy's Street is a narrow street used generally for dwelling and residential purposes. It has not been declared as a street in which the erection of buildings of the warehouse class will be allowed (Sec. 367 (i) (c) (iii), Act III of 1899).

The passage to the east of the above premises opens both on Roop Chand Roy's Street and Harrison Road, so that the premises though numbered from Harrison Road may be said to abut on both Harrison Road and Roop Chand Roy's Street.

The Government of Bengal on the recommendation of the Corporation published a declaration under Section 367 of the Municipal Act declaring that a portion of Harrison Road including the portion on which the building stands is a locality where buildings of a warehouse class would be allowed. This meant that such buildings would be governed by a particular set of regulations to be found in Part V of Schedule XVII to the Act, the benefit of which cannot be enjoyed in the case of buildings of the warehouse class in area not notified under Sec. 367 (1) (c) (iii).

Chand Ghansam Das relying on the Government resolution and the amalgamation of their

CASE.—(*contd.*)

Secs. 3 (4) & 367. *Building of Warehouse class.* (contd.)

building into one 160, Harrison Road submitted a plan showing additions and alterations to the premises No. 160, Harrison Road, (which includes the premises formerly bearing the number 10, Roop Chand Roy's Street now amalgamated with 160, Harrison Road) and claimed that the same should be treated as a building of the warehouse class.

The matter came up before the Roads and Buildings Sub-Committee of the Corporation on the 31st August, 1911. It would appear from the Proceedings that Messrs. Tara Chand Ghansam Das were required to submit a case for Counsel's opinion.

When the matter came up before the General Committee of the Corporation for confirmation on the 21st September, 1911, objections were taken on behalf of Babu Banku Lal Dhar, a neighbouring owner of the premises No. 8/4, Roop Chand Roy's Street lying to the East of No. 160, Harrison Road, to the opinion so placed before the Committee, on the ground that the case submitted was not full and exhaustive. The General Committee gave liberty to Babu Banku Lal Dhar to submit a case. The resolution of the General Committee will appear from the said proceedings.

The case submitted as aforesaid did not touch on the following facts:—

(1) That the portion of the premises 160, Harrison Road abutting on Harrison Road is not intended to be pulled down. This is a four storeyed structure of which the ground-floor is used for shops let out separately, the second and third floors are used for residential purposes, and the first floor is used as gaddis and offices. Part of the first floor also appears to be occupied at night.

(2) That, as would appear from the plan submitted, and the present use of the portion abutting on Harrison

CASE.—(*contd.*)

Secs. 3 (4) & 367 *Building of Warehouse class.* (contd.)

Road, the building intended to be constructed would be used as follows :—

(a) The old portion abutting on Harrison Road would be used partly for residential purposes and partly as shops and offices as stated above.

(b) The new portion on the back of the said portion would be constructed for being let out in separate rooms to different persons, on the ground floor for shops, on the first floor as godowns, on the second floor as offices while the topmost floor would be used for residential purposes.

The air and light of the adjoining buildings will no doubt be affected by the construction of the proposed building, but the Corporation of Calcutta requires an opinion as to whether the building intended to be constructed is a building of the warehouse class under Sec. 3 (4) of the Municipal Act and whether its construction will be regulated by the provisions of Sec. 367 (i) (c) (ii) or of Sec. 367 (1) (c) (iii) of Act. III of 1899.

In the circumstances Counsel is requested to advise :—

1. Whether having regard to the present condition and position of the building which will not be demolished, and the nature, extent and scope of the building intended to be put up as shown in the plan and stated above, the whole building comes under the definition contained in the Municipal Act of a building of warehouse-class?

2. Whether the building proposed to be erected is a building of the warehouse class, regard being had to the facts that it would be a four-storeyed masonry building exceeding in cubical extent one hundred and fifty thousand cubic feet, to be used for the following purposes :—

(i) Ground-floor to consist of shops.
(ii) First-floor for godowns,

CASE.—(*concld.*)

Secs 3 (4) & 367. *Building of Warehouse class.* (contd.)

(iii) Second-floor for offices.

(iv) Third-floor for residence and regard also being had to the fact that the rooms will be let to separate tenants and not as a whole.

3. Whether so far as the proposed building abuts on Roop Chand Roy's Street the same is not subject to the provisions of Rule 29 of Schedule XVII of the Act? In other words, whether having regard to the fact that the building will abut at one end on Roop Chand Roy's Street, which is not an area declared under Sec. 367 (1) (c) (iii), the building will not be governed rather by the provisions of Sec. 367 (1) (c) (ii) than by those of Sec. 367 (i) (c) (iii).

4. Whether the letting of the ground-floor consisting of shops to different persons separately would not take the building out of the category of warehouse class buildings which would appear to mean an entire whole used solely for warehouse purpose or purposes immediately connected with it.

5. Whether the separate uses to which the building is to be put as above stated would not contravene the provisions of the law relating to building other than warehouse.

6. And generally whether the authority should sanction the plan as a building of the warehouse class or not?

OPINION.

(Obtained by the Corporation.)

"1. Having regard to the present condition and position of the building which is not to be demolished,

OPINION.—(*contd.*)

Secs 3 (4) & 367. *Building of Warehouse class.* (contd.)

and to the nature, extent and scope of the building which it is intended to erect as shown in the plan and as stated in the instructions, I am of opinion that the whole building must be regarded as a building of the warehouse class as defined by Section 3 (4) of the Calcutta Municipal Act.

By that defintion any masonry building exceeding 150.000 cubic feet in extent which is not a "public building" as defined by clause (36) of the same Section is a "building of the warehouse class."

Inasmuch as the building in question exceeds the specified cubical area and is not a public building within the defintion it must, upon a strict interpretation of the Act, necessarily be regarded as a "building of the warehouse class."

It is observable that the definition of the expression "building of the warehouse class" in the Calcutta Municipal Act is taken directly from the London Building Act 1894, with this remarkable difference, that whereas the definition in the London Act concludes with the words 'which is neither a public building nor a domestic building," the Calcutta Act concludes with the words "which is not a public building as defined in this Section," omitting the words "nor a domestic building."

This peculiar wording may in some cases, and possibly in the present case, achieve results which were not contemplated by the framers of the Act, but so long as it remains unamended, the ordinary grammatical meaning must be given to it, unless another construction be warranted by express decision of the High Court.

2. Owing to the peculiarity of the wording of the definition in the Calcutta Act, I am of opinion that the

OPINION.—(*concld.*)

Secs 3 (4) & 367. *Building of Warehouse class.* (concld.)

building proposed to be erected is a building of the warehouse class, although it is intended to be used as shops, godowns, offices and residence, and although the residential rooms on the third floor are intended to be let to separate tenants.

3. Harrison Road having been declared to be a locality within which the erection of buildings of the warehouse class will be allowed under Section 367 (1)-(c) (iii) of the Act, that sub-clause is, in my opinion, applicable notwithstanding that a portion of the proposed building will abut on Roop Chand Roy's Street which is not a locality so declared.

4. Having regard to the definition I am of opinion that the letting of the ground-floor shops to different tenants would not remove the building from the category of a building of the warehouse class. Though the shops will be separate, yet each will be structurally connected with and form part of one building.

5. The separate uses to which the building is intended to be put, *i e.*, the fact that the different floors are to be used as shops, godowns, offices, and residence respectively will not contravene the law, provided that the building plans comply in all respects with the requirements of the Act as regards buildings of the warehouse class.

6. In my opinion the authorities in considering the plan should regard the building as one of the warehouse class, and if it complies in all respects with the requirements of the Act as to buildings of that class, they should sanction the plan.

G. H. B. KENRICK,
Advocate General.

10th June, 1912.

Position of Receiver— Liability in case of Bustee Improvements.

CASE.

Secs 3 (30) & 32. *Receiver if owner or occupier.*

Counsel's attention is invited to Sec. 613 of the Calcutta Municipal Act and to the decision of the case Fink *vs.* Corporation (Vide pp. 1 and 2, Part I of Legal Opinions and Rulings).

1. Whether a Receiver appointed by a Court of Law can be treated as an *owner* or *occupier* within the meaning of the said words under the Calcutta Municipal Act?

2. Whether a Notice under Sec. 408 can be served on a Receiver to carry out Bustee improvements, and in default of compliance with the Notice what steps can be taken to carry out such improvements?

3. Is service of a Notice on the Receiver binding upon the parties, *i.e.*, the beneficiaries?

4. Assuming that there is a Receiver, cannot the beneficiaries be proceeded against instead of the Receiver after due and proper service of notice on the beneficiaries?

5. And generally as to the steps to be taken in connection with properties in the hands of a Receiver?

OPINION.

1. In my opinion unless and until the decision in Fink *vs.* Calcutta Municipal Corporation, 7 C. W. N. 706 (also reported somewhat more fully in 30 Calcutta 721) is overruled on the point, the case must be regarded as a conclusive authority to the effect that a Receiver appointed by the High Court is not an *owner* within the meaning of the word in the Municipal Act; [although Sec. 61 (b) of the Act, to the effect that a Receiver may under some circumstances, and for a certain purpose,

OPINION.—(*contd.*)

(election of Commissioners), be regarded as an owner. does not appear to have been brought to the notice of the Court].

Secs. 3 (30) & 32. *Receiver of owner or occupier.* (contd.)

I limit my answer to the case of a Receiver appointed by the High Court—Fink's case, above referred to, relates to such a Receiver—and I believe it has always been considered that the jurisdiction of the High Court in relation to Receivers is founded to some extent upon the jurisdiction possessed by the Old Supreme Court, under its Charter of 1774, and does not depend entirely upon the statutory jurisdiction under the Specific Relief Act and the Civil Procedure Codes.

In the case of a Receiver appointed by a Court other than the High Court, the decision in Fink's case would not necessarily be an authority. Such a case, I imagine, is hardly likely to arise. If it does, I am not sure that the same conclusion should follow as that in Fink's case. It might be affected by the circumstances under which the appointment of a Receiver was ordered and the terms of the order, considered in connection with the particular provisions of the Municipal Act out of which the question for determination might arise.

And the decision in Fink's case would not apply to a Receiver appointed by the parties themselves—as in the case of Receivers apopinted by Mortgage and Debenture Deeds, and other securities, partnership deeds, or any other of the various instruments, interparties, under which a Receiver is sometimes appointed—and such a Receiver (of immovable property) would usually, I think, be in the position of an *owner* within the provisions of the Municipal Act, as he is generally made the agent of some or other of the parties to the instrument for the collection of the rents of the property, and, as such would come within the definition of *owner* in the

OPINION.—(*contd.*)

Secs 3 (30) & 32 *Receiver if owner or occupier*, (contd)

Act. The position of a Receiver—under the Court of Chancery at any rate is peculiar.

As Mr. Justice Chitty said in his judgment in Corporation of Bacup *v* Smith, 44 Ch. Div. 395, "A Receiver is not an Agent for any other person and a Receiver is not a Trustee." But this can hardly be said of a Receiver appointed by the parties themselves, and His Lordship, in his judgment (p. 399) carefully points out that he is not speaking of the Receiver of the parties, (but of a Receiver appointed by the Court of Chancery).

This case (Corporation of Bacup *v* Smith) is a decision upon Sec. 74 of the Public Health Act of 1875, which is substantially the same, for the present purpose, as the definition of *owner* in Sec. 3 (32) of our Municipal Act. It therefore distinctly supports the decision in Fink's case.

As regards the question as to the word *occupier* there can I think be no doubt. A Receiver—however appointed—does not pay, and is not liable to pay, the rent, to the owner, in the sense in which the expression 'pay the rent', or 'liable to pay the rent' is used in Sec. 3 (30).

He is clearly not an occupier within the definition of the word in the Act.

2. It therefore follows clearly that the notice cannot be served on the Receiver, who is neither owner, nor occupier, within the meaning of the section. And Corporation of Bacup *vs.* Smith, U. S. is a distinct authority to this effect.

3. No. Such service is "bad". Corporation of Bacup *v.* Smith U. S.

4. Yes. That is to say the Corporation can take the same measures (including the service of notice upon the owners or occupiers of huts, or notice upon the owners

OPINION.—(*concld.*)

of the land, under Sec. 408) to have the improvements carried out, as they could take if there were no Receiver: With this qualification only, *viz.*, that to avoid the possibility of trouble on the ground of improper interference with the Court's Receiver the Corporation should apply in the suit in which the Receiver was appointed for an order that they be at liberty notwithstanding the appointment of a Receiver in the suit, to take proceedings under Chapter XXVI of the Municipal Act for the improvement of the Bustee. Such an application, and order, (appropriate to the circumstances of the case) had been applied for and made in the case in 11 Ch Div. 395, that I have been referring to.

Secs. 3 (30) & 32. *Receiver if owner or occupier.* (concld.)

The High Court would, I imagine, almost as a matter of course, make the order.

THOS. R. STOKOE,

18*th June*, 1911.

Sewered Ditches if Public Streets or only "Means of access" as contemplated in Rule (80) (2) (e).

CASE.

Before the introduction of the sewer system into Calcutta there were open drains along the streets and between blocks of buildings. With the introduction of the sewer system these drains were covered up, and gradually came to be used to give access to the buildings abutting on them. They are now known as sewered ditches, and are maintained, cleansed and in some cases lighted by the Corporation.

Sec. 3 (37) & Rule 30(2)(e) Sch. XVII. *Sewered Ditches if public streets or only "means of access."*

A question has arisen as to whether these sewered ditches should be treated as public streets for the purposes of the building regulations or whether they should be treated as drains.

CASE —(*contd.*)

Sec. 3 (37) & Rule 30 (2)(e), Sch XVII *Sewered Ditches if public streets or only "means of access."* (contd)

A public street is defined in Section 3 (37) of Act III of 1899. A drain is defined in Section 3 (6) of the Act.

It is to be noted that these sewered ditches though covered up and used in many cases for access to buildings, exist as covered-up sewers or drains; and in many cases where they are no longer required as passages to any other buildings, they or portions thereof are sold or otherwise disposed of to adjacent owners of buildings which abut exclusively on such sewered ditches or the portions thereof and as such not required for the use of any other buildings.

These sewered ditches when situated on the front of a building operate as the cause of great hardship on the owners of buildings in the regulation of heights of buildings sought to be erected or re-erected on the site, as in most cases the width of such sewered ditches vary from 2 to 4 feet and as the height of buildings allowable would, under Rule 2 of Schedule XVII, come up to the width of the sewered ditches in front or one and a half times such width as the case may be.

In 1903 a case was sent to the Hon'ble Advocate-General, Mr. L. P. Pugh, as to whether a sewered ditch was a public street or not. The learned counsel on a consideration of Sec. 3 (37) and Sec. 354 of Act III B. C. arrived at the following conclusion :—

"I am of opinion that the passage as above described on which, as I understand, the public have a right of way is a public street within the meaning of Sections 3 (37) and 354 of the Act."

It is submitted that the case was imperfectly put and the attention of the Advocate-General was not drawn to the origin and actual use of the sewered ditches aforesaid

CASE.—(*concld.*)

as sewers or drains, and that at least for the purposes of regulation of building heights these sewered ditches should be treated as covered up sewers.

Sec. 3 (37) & Rule 30 (2 (e), Sch. XVII. *Sewered Ditches if public streets or only "means of access."* (contd.)

The Advocate-General is requested to advise whether these sewered ditches should, for the purposes of the regulation of building heights, be treated as public streets or whether they should be treated only as existing means of access to buildings within the meaning of Rule 30 (e) of Schedule XVII of Act III. B. C. of 1899?

OPINION.

The case of a covered sewer becoming converted into a narrow passage between two lines of buildings, and thereby serving as a means of access to such buildings does not appear to have been contemplated by the framers of the Calcutta Municipal Act 1899.

If in any particular instance it could be established that subsequent to the date of the covering in of the sewer which was formerly an open sewer, the public have acquired a right of way over and along the surface, this would amount to "a passage, whether a thoroughfare or not over which the public have a right of way" and, as such, it would be a "public street" within the definition contained in Sec. 3 (37) of the Act, and would, in consequence, be subject to the building requirements of the other sections of the Act.

In my opinion, however, it would, in most cases, be extremely improbable that a public right of way as distinguished from a mere easement or right of access to particular doorways or openings in the adjacent buildings could be proved. I am of opinion, therefore, that

OPINION.—(*concld.*)

Sec. 3 (37) & Rule 30(2)(e). Sch. XVII. *Sewered Ditches of public streets or only "means of access."* (concld.)

for the purpose of regulations as to the height of buildings, etc., such passages should be regarded by the Corporation merely as existing means of access to buildings within the meaning of Schedule XVII Rule 30 (e) of the Act, and not as public streets.

In the circumstances it would seem expedient and advisable that the existing legislation should be supplemented so as to enable the Corporation or the Chairman after inspection of the site to declare that in the particular case the ordinary rules as to height of buildings, side spaces, etc., shall be applicable.

G. H. B. KENRICK,
Advocate-General

21*st January*, 1910.

Recreation ground equipped with Gymnastic apparatus—Contribution to Volunteer Band—If expenditure legal.

CASE.

No written case was submitted. The opinion was obtained in conference.

OPINION.

Sec. 14(2)(xi). *Gymnastic apparatus and Contribution to Volunteer Band.*

I feel grave doubts as to the power of the Calcutta Corporation (1) to pay for the provision of suitable apparatus for a playground in Halliday Square and (2) to pay a certain amount monthly for the establishment in connection therewith.

Such powers have been conferred upon local authorities in England by special Acts *e.g.*, the Museums and Gymnasiums Act 1891, and the Public Libraries Acts generally. I do not think the provisions of Section 54, Clause 2 of the Calcutta Municipal Act are wide

OPINION.—(*concld.*)

enough to cover the purpose in question. Clause 2, Sub-Clause xi, is the general and widest part of the section but it seems to me that the provision of gymnastic apparatus or a gymnastic master does not come within the scope even of that wide clause.

Sec. 14(2)(xi). *Gymnastic apparatus and Contribution to Volunteer Band.* (concld.)

The question whether the Corporation can make a grant of Rs. 1,000 or any other sum annually for the maintenance of the Volunteer and Town Band is open to still graver doubts. I can hardly think that such payment is likely to promote "the public health, safety or convenience".

It would appear that under the Public Health Act of 1875, the Local Government Board held that though a local authority might provide and pay for band stand and seats as adjuncts to a public pleasure ground, it could not under the general law defray from the rates the expense of a band of musicians (see Lindley's Public Health, 7th edition, page 373). This seems to have been changed by express legislation *vide* the Public Health Acts Amendment Act, 1907 Sec. 76, Clauses (c) and (d), which authorises local authorities (1) to provide apparatus for games, etc., and (2) to provide or contribute towards the expenses of any band of musicians to perform in a park, etc.

It seems to me therefore that in the absence of specific provisions similar to the above or of words conferring a wider discretion than is given by Sec. 14 the Corporation cannot pay or contribute towards the expenses of the Band.

March, 1913. S. P. SINHA.

Election Roll—Owners and occupiers of huts valued at not less than Rs 300 per annum if eligible to vote.

CASE.

Secs. 37 (2) (i) (c), 153, 164 & 165. *Hut owners and occupiers. Eligibility to vote.*

A question has arisen as to whether owners and occupiers of huts in a Bustee or Bustee land are entitled to votes when such huts have been valued for assessment purposes at not less than Rs. 300 per annum.

Reference should be made to Sec. 37, Clause (2) (a) (b) (c), 151 Proviso (1), 153, 164, 157 (3), 159, 165, 180; Bustee and bustee land are defined in Section 3 (5) & (6) and under Section 4 the decision of the General Committee is final as to whether a particular land is a Bustee or Bustee land. The consolidated rate it is to be noted, is ordinarily payable one-half by the owner and the other half by the occupier of the premises in question (*vide* Sec. 171). But under Section 180 the entire rate in respect of Bustee land is payable by the owner and in assessing Bustee land the particulars or details which are noted are hereto annexed. But in the Assessment Register all these details do not appear.

A copy of the Assessment entry is also annexed.

Having regard to Sec. 164 (2) it is contended by some that those details also form part and parcel of the Assessment Book.

If the details referred to above be treated as part of the Assessment Book then each hut has got a separate valuation and a separate number, but if on the other hand, the Assessment Register as kept be referred to, then individual huts have no place therein so that they have no separate valuation and number.

The words "building" and "land" are nowhere defined. Hut is a building *vide* definition Section 3 (22) and masonry building is defined in Section 3 (25).

CASE.—(*concld.*)

Secs. 37 (2) (i) (c), 153, 164 & 165. *Hut owners and occupiers Eligibility to vote.* (contd.)

The practice has hitherto been not to allow votes to hut owners or occupiers in Bustee land on the ground that they do not pay any rates directly under the Act and are therefore not qualified to be entered in the Election Roll as voters, and further their names are not entered in the Assessment Register or Book above referred to.

It has, however, now been contended on the strength of details of assessment above referred to that an owner or occupier of a hut in Bustee land which appears to have been valued at Rs. 300 per annum is entitled to be a voter and if the same person happens to be both owner and occupier he is entitled to be a voter of the hut which has been valued at Rs. 150 per annum. The present Election list has been prepared and is subject to revision —*vide* Election Rules.

1. Counsel will please advise the Chairman as to the rights of these hut owners in Bustee land and occupiers and the course to be adopted by the Chairman with reference to the revision of the Voters' List.

2. Whether having regard to Sections 37 and 165 and Rules 2, 3, 8 and 10 of Schedule IV new names could be entered in the Assessment Register between 1st December and 1st January following, and thereafter such names entered on the Voters' list or Election Roll for the purposes of the ensuing Election.

OPINION.

The questions relate to the position of owners of huts in Bustee land with reference to the Election Roll.

Huts are required to be valued separately from the land for assessment purposes (Section 156). The particulars of such assessments must be entered in a book and

OPINION.—(*concld.*)

Secs. 37 (2) (i) (c), 153, 164 & 165. *Hut owners and occupiers. Eligibility to vote.* (concld.)

whether they appear in what the Corporation calls a "valuation list" or whether they appear in what they call the "assessment book," such book or books will constitute the "assessment book" mentioned in Sec. 164

The so-called "valuation list" does in fact contain the names of the hut owners but if it did not form a part of the assessment book under Sec. 164, a hut owner could, as "owner" or "occupier," claim to have his name entered under Sec. 165.

It follows, therefore, that in preparing the Election Roll under Section 36 and according to Rule 2 of Schedule IV, the Chairman should enter the names of such hut owners as fulfil the requirements of Section 37.

Having regard to the definition of hut in Sec. 3, Clause 22, the word "building" in Sec. 37 does, in my opinion, include huts.

(2) Any person who has his name entered in the "Assessment Book" after the 1st of December may, if he applies before the 1st of January next, claim to have his name entered in the Election Roll.

10*th January*, 1912. S. P. SINHA.

Cumulative Votes—Limitation if applicable in case of persons representing different companies, etc.

CASE.

Not available.

OPINION.

Sec. 50. *Cumulative votes. Limitation.*

I am of opinion that the proviso to Sec. 50 has no application to a case when a person is entitled to vote in different capacities. Thus if A holds powers of attorney from several different companies, firms, etc.,

OPINION.—*(concld.)*

he will be entitled to vote for each of the companies, firms, etc., though the total number of such votes added together may exceed 11. My reading of the Proviso to Sec. 50 of the Act is that no person can in one and the same capacity have more than 11 votes. Therefore, in the case above given, as also in the case of Receivers, Trustees etc., the same person, if representing different estates, will be entitled to vote separately in respect of each estate.

Sec 50. *Cumulative votes. Limitations to.* (concld.)

21*st December*, 1908. S. P. SINHA.

Provident Fund Money—Refund on termination of first period of appointment—Re-employment no bar to such refund.

CASE

Not available.

OPINION.

(Obtained by the Solicitor.)

We are of opinion that termination of service by effluxion of time is included within the terms "retirement from the service" etc., in Rule 18 of the Provident Fund Rules of the Corporation of Calcutta.

Sec. 73 (c). Provident Fund Rules. *Refund of money on termination of period of appt*

Babu Moni Lal Sen's term of service under the first appointment having terminated he became entitled to be paid the aggregate amount subscribed by him to the Fund and the amount standing to his credit for interest, for that period *viz.*, 5 years and under the proviso to Rule 18 the Managers may pay him such portion of the balance as the General Committee may direct.

Solor's opn.

We do not think that this right, which accrued at the end of the 5 years is in any way waived or extinguished by the fact that the Corporation has appointed him for the second time for a further period of 10 years. This is a fresh engagement and does not affect the terms and conditions of the first.

S. P. Sinha,

15*th December*, 1910. B. C. Mitra.

OPINION.—(*contd.*)

(Obtained by the Corporation.)

Sec. 73(c). Provident Fund Rules. *Refund of money on termination of period of appt.* (contd.)

I have been asked to express my opinion upon the question as to what is the position of an officer of the Corporation, a member of the Provident Fund, who is engaged for a term of say 5 years, and who on expiration of the 5 years is re-engaged (it may, or not, be on the same terms as before) in the same office for a further term of say 10 years. Is he, or is he not, entitled to be paid the amount to his credit in the Provident Fund, at the termination of the 5 years' period of service.

Solcr's. case.

In my opinion according to his strict legal rights (though I admit the construction is not altogether in accordance with the *spirit* of the Rules) he is so entitled, provided no agreement, expressed or implied, is come to between the Corporation and himself in relation to his re-engagement in the service of the Corporation to the effect that the sum to his credit in the Fund is to remain and continue there, as appendant to the new relationship between him and the Corporation, and is not to be withdrawn otherwise than as it might become subject to withdrawal if it in fact represented subscriptions, etc., during the new term of engagement. This right to the money would, I think, be the natural and legal position as between the parties resulting from the termination of the 5 years' engagement by effluxion of time merely, if uncontrolled by any agreement. The term of service having expired, the money in question becomes payable to the officer under the Rules of the Fund; he becomes entitled to receive it, and such right in the absence of agreement to the contrary, is not affected by the fact that he enters into a new engagement of service to the Corporation. And I also think that if nothing is said on the subject, and nothing bearing on the subject takes place beyond the new engagement for further period, it would not be a correct view to hold that from these circumstances an agreement was to be implied

OPINION.—*(concld.)*

that there was an abandonment or waiver of the officer's then present right to receive the money he had become entitled to, but that it was to remain to his credit in the fund as appendant to the new, or renewed, relationship between himself and the Corporation.

Sec 73(c). Provident Fund Rules. *Refund of money on termination of period of apptt.* (concld.)

23*rd November*, 1910. THOS. R. STOKOE.

Provident Fund Rules—Withdrawal to Pension Fund, Legality of—Subscribers' Accounts, how to be made up—If voluntary subscriptions entitled to share of profits.

CASE.

The Corporation of Calcutta has a Provident Fund of its own established under Section 73 (c) of the Calcutta Municipal Act III B.C. of 1899.

Sec. 73(c). Provident Fund Rules. *Withdrawals to Pension Fund. Subscribers' accounts.*

The Provident Fund Acts (Act IX of 1897 and Act IV of 1903) may also be referred to.

Rule 5.—Provides for (1) Compulsory, (2) Voluntary subscriptions.

Rule 9.—Provides for the contribution by Corporation equal to the aggregate amount of the compulsory subscription for the year.

Rule 13.—Provides for the making up of the Subscribers' Account.

This rule requires careful consideration, especially the portion commencing with "*Any sums forfeited to the Fund, etc.,*" and the words "*all other moneys (if any) that should properly be brought into account*" and the words "*in respect of his total subscriptions both voluntary and compulsory* with his share of the amount so ascertained."

CASE.—(*contd.*)

Sec. 73(c). Provident Fund Rules. *Withdrawals to Pension Fund. Subscribers' accounts.* (contd.)

Rule 14.—Should also be noted.

Rule 16.—Lays down that no payment is permissible except as is by these Rules and Regulations provided.

Payment can only be made—

(1) On death of a subscriber.

(2) On his volutary resignation or retirement.

(3) On the subscriber becoming permanently incapacitated, etc., as in Rule 19 is mentioned.

(4) On dismissal, the subscriber getting the aggregate amount of his subscriptions only. No interest nor any portion of the contribution made by the Corporation under Rule 9 is payable to him.

Rule 24.—Reserves power to alter, vary and modify these rules and regulations without affecting the rights of any employee with respect to the Fund.

Rule 25.—Provides for reference to the Corporation of any dispute regarding these rules and regulations and the interpretation thereof as therein mentioned.

It appears that the Corporation has, from time to time, allowed employees who entered into the service of the Corporation before the establishment of the Provident Fund and who under some misapprehension were prevented from contributing to the Pension Fund and allowed to become subscribers to the Provident Fund, to subscribe to the Pension Fund *subsequently* and in so doing directed withdrawal from the Provident Fund of the whole of the amount lying to the credit of such employee.

Having regard to such Resolutions of the Corporation, these subscribers to the Provident Fund have raised the question as to whether the Corporation is

CASE.—(*contd.*)

justified in withdrawing the amount lying to the credit of such employees and applying the Corporation contribution as part and parcel of the revenue of the Corporation consistently with the existing Provident Fund Rules and Regulations.

Sec 73 (c). Provident Fund Rules. *Withdrawals to Pension Fund. Subscribers' accounts.* (contd.)

These subscribers also suggest that the Corporation cannot withdraw any portion of its own contribution to the Provident Fund being the equivalent of the subscribers' compulsory subscription in any case so long as the Provident Fund exists, and that the amount of such contribution in respect of the employees who have been allowed to contribute towards the Pension Fund should be deemed to have become forfeited to the Provident Fund and be distributed under Rule 18 amongst the present body of subscribers on the footing of the provisions of the said Rule.

The Rules, it should be noted, do not provide for forfeiture until the retirement, resignation or dismissal of any subscriber. The cases dealt with by the Corporation have been dealt with as special ones and are clearly not cases of retirement, resignation or dismissal, and it is very doubtful whether the Provident Fund Rules can be applied or invoked to bring about a forfeiture within the meaning of those rules in the events which have happened.

Questions have also arisen as to the correct method of keeping the Subscribers' Account under Rule 18.

Counsel's attention is invited to the following notes of the Chief Accountant and the Vice-Chairman.

Vice-Chairman's [illegible]

The Vice-Chairman interprets the [illegible] amount standing to his credit on such 31st December" [illegible]

CASE.—(*contd.*)

Sec. 73 (c). Provident Fund Rules. *Withdrawals to Pension Fund. Subscribers' accounts.* (contd.)

his credit being the result of his compulsory and voluntary subscriptions, including as a result the contribution from the Corporation equivalent of his compulsory subscription which under the first provision in that article is credited to his account on 31st December of each year, the above contribution from the Corporation being made in respect of his compulsory subscription under article 9.

The Chief Accountant interprets the above to mean the amount at a subscriber's credit being the result of his compulsory and voluntary subscriptions, excluding the contribution from the Corporation.

Chief Accountant's note dated 16th September, 1910.

"I regret I cannot agree to the latter paragraph being attributed to me, I contend that the words 'the amount standing to his credit on each 31st December,' cannot be taken out of the Rule and discussed without the context 'in respect of his total subscriptions both voluntary and compulsory.' It is the last 3½ lines of the Rule upon which I place my interpretation. From the words 'in proportion' to the end of the Rule must be interpreted not one portion of it only, leaving out the other I think our two notes should go as they stand without any addition on either side."

Counsel will be pleased to advise the Trustees—

(1) Whether the Corporation is competent to do what they have done. If not, whether the Trustees can request the Corporation to refund the amounts so withdrawn?

(2) Whether if the amounts be refunded by the Corporation, the same are liable to be distributed amongst the subscribers under Rule 13 or the subscribers will only receive the interest accruing thereon.

CASE.—(*concld.*)

If neither of these is permissible, how are such sums to be dealt with in keeping the Subscribers' Account under Rule 13.

Sec 73 (c). Provident Fund Rules. *Withdrawals to Pension Fund. Subscribers' accounts.* (contd.)

(3) How is the account of the subscribers to be made up in view of Rule 13, whether as suggested by the Vice-Chairman or by the Chief Accountant?

(4) And generally what the Trustees should do in the events which have happened?

OPINION.

1. In my opinion the Corporation were not acting within their rights or powers in dealing as they did with the subscription to the Provident Fund (including the contributions of the Corporation) of the employees who were admitted to the Pension Fund. The Provident Fund Rules do not provide for or contemplate any such application or disposition of the funds as was made, and on the other hand the Rules are rather insistent that the funds shall only be applied or dealt with in accordance with the Rules and Regulations. As a matter of fact the Rules contain no provision applicable to the cases referred to.

By the question, whether the Trustees can request the Corporation to refund the amounts so withdrawn, I suppose is meant, whether the Corporation is under a legal obligation to refund the amount withdrawn, and whether the Trustees have any legal right to require and compel such refund.

I very much doubt whether either such legal obligation, or legal right, exists. And if I were advising the

OPINION.—(*contd*)

Sec 73 (c) Provident Fund Rules. *Withdrawals to Pension Fund. Subscribers' accounts* (contd.)

Corporation I should be inclined, I think, under the circumstances, to advise them to decline to comply with such a requisition if made.

There is no ground whatever for the suggestion that the contribution of the Corporation should be deemed to have become forfeited to the Provident Fund and be distributed under Rule 13 amongst the present body of subscribers on the footing of the provisions of that Rule.

The case is more within the spirit of Rule 19 than of any other, under which the subscriber becomes entitled to be paid the whole amount to his credit in the books of the Fund.

2. In my opinion if the amounts were refunded by the Corporation the same would not be liable to be distributed amongst the subscribers under Rule 13 nor would the subscribers be entitled to receive the interest acruing thereon.

I think the proper way to deal with them would be to keep accounts of them with the subscribers themselves on whose account they were originally subscribed or contributed dealing with them as subscriptions to the Provident Fund, and retaining them until the event happened (death, resignation, retirement or dismissal, etc.,) which under Rules 17—20 would determine their destination *viz.*, payment to the subscriber or his representatives or to the Corporation (if such is the construction under Rule 18 as regards the contributions of the Corporation) or as a forfeiture to the fund and then to dispose of them accordingly, or until an alteration had been made in the Rules of the Fund (which I think it is competent to the Corporation to make) under which the amounts in question, with accretions under the Rules, might be at once paid over to the subscribers on whose account, primarily, they were held.

OPINION.—(*contd.*)

Sec 73 (c). Provident Fund Rules. *Withdrawals to Pension Fund. Subscribers' accounts* (contd.)

3. The Provident Fund is established under Section 73 (c) of the Calcutta Municipal Act III of 1899 B.C. which provides that the Corporation may by resolution make rules for establishing and maintaining a provident or annuity fund, and for compelling all or any of the Municipal officers or servants to contribute to such fund. The question therefore that arises is—*What* is the Rule that the Corporation have in fact made? Not, whether or not the Rule made is as equitable, or as appropriate in all respects, as it might have been? And it appears to me that taking Rule 13 by itself alone the constructions put upon it by the Chief Accountant—and not that suggested by the Vice-Chairman—is the meaning of the Rule upon its proper construction. The Rule provides—equitably or inequtably, fairly or unfairly, consistently or inconsistently—that the amount therein referred to available for division among the members shall be divided among them by crediting each subscriber, *in proportion to the amount standing to his credit* on 31st December *in respect of his total subscriptions both voluntary and compulsory*, with his share of the said amount. The question is what is the meaning of his "total subscriptions both voluntary and compulsory"? Does it include or exclude, the contribution of the Corporation under Rule 9 of an equivalent of the compulsory subscription? According to the natural meaning of the language of the Rule the subscribers' "compulsory subscription" does not include the Corporation's contribution, Veerchand *vs.* B. B. and C. I. Railway Company, 29, Bombay, 259, and the Rules are, *prima facie*, to be construed according to the natural sense and meaning of the language in which they are expressed.

It is true that the Provident Funds Act IX of 1897 provides in section 2 (4) that in that Act the expression

OPINION.—(*contd.*)

Sec. 73 (c). Provident Fund Rules. *Withdrawals to Pension Fund. Subscribers' accounts.* (contd.)

"compulsory deposit" means 'a subscription or deposit which is not repayable on the demand, or at the option, of the subscriber or depositor, and includes any contribution which may have been credited in respect of such subscription or deposit under the Rules of the Fund'. But this provision of the Statute does not operate to impart a like meaning to the expression 'compulsory subscription' in the Provident Rules of the Corporation. The latter expression, in the Rules, I entertain no doubt, is to be construed in accordance with the ordinary and natural sense and meaning of the words themselves, and not otherwise.

Accordingly, I think, as I have said, that taking Rule 13 by itself alone, the Chief Accountant's construction of it is the correct one *viz*, that the Corporation's contributions are not to be included in the calculation of the proportion in which the item of account (amount available for division) there referred to is divible among the subscribers.

I am told however that if the above construction is put upon Rule 13 the result is that the interest upon the security investments representing the amount of the Corporation's contributions will not go to the same persons under Rule 13 as those who are to take it under Rule 14, and that the only way to make the two Rules work harmoniously is to adopt the Vice-Chairman's construction of Rule 13. I don't know how this may be, though the contention appears to me to be sound. The working of these two rules appears to be more a matter for the Accountant to deal with, and all I will add is that in face of what it seems to me is the plain meaning of the language of Rule 13 upon its proper construction I find it difficult to adopt any other construction than that which the Chief Accountant puts upon

OPINION.—(*concld.*)

Sec. 73 (c). Provident Fund Rules. *Withdrawals to Pension Fund Subscribers' accounts.* (concld.)

it, and if it in fact leads to some inconsistency I should be disposed to fall back upon the word "provisionally" in the Rule ("shall provisionally credit each subscriber") and understand it, as contemplating some subsequent completion of the subscribers' accounts in which the provisional entries are to be put right, if necessary.

4. I do not advise the Trustees to do anything, but to leave matters as they are. It appears that the Trustees are to be appointed annually (Rule 4) which seems an inappropriate course where any active duties in the nature of the performance of trusts are to be performed, and in this instance the nature of the office is perhaps more akin to that of Treasurers than Trustees. It seems that a mistake has been made in the withdrawal of the sums referred to from the Provident Fund, and it is not very easy to say in what way the mistake ought to be remedied. It does not appear that anybody has at present been injured by the wrongful course taken, and possibly no one ever will be. The withdrawal of the Corporation contributions, and the absorption of the amount in the general funds of the Corporation, may, as between the Corporation and the particular subscribers, be regarded as the consideration for which the Corporation allowed the transfer of the subscriber from the one Fund to the other.

But if these transfers are likely to be continued it seems desirable that the Provident Fund Rules should be altered so as to permit of the funds at credit of a transferring member being dealt with in such a manner as may be considered desirable to meet the circumstances.

23*rd November*, 1910. THOS. R. STORER.

Appointment of Assessor by Corporation—Proposing candidates—Chairman if a "Commissioner" within meaning of Rule 21 of Rules of Business.

CASE.

Not available.

Sec. 85 *Rules of Business. Scope of expression 'Commissioner' in Rule 21.*

The facts were:—At the special meeting of the Corporation held on the 18th December, 1912 for selecting a suitable candidate for the post of Assessor, the Chairman moved that Mr. D. P. Roy be ballotted for as Assessor to the Corporation. Other candidates were similarly proposed by some of the Commissioners. Ballot papers were issued and were collected when one of the Commissioners present raised the point that according to the explanation to Rule 21 of the Rules of Business "any Commissioner present may propose any candidate," and that the Chairman, not being a Commissioner, was precluded from proposing as he did. The meeting was adjourned and it was resolved that Counsel's opinion be taken as to the position of the Chairman under Rule 21 of the Rules of Business.

OPINION.

The question put to me for opinion is whether under Rule 21 of the Rules of Business framed by the Corporation under Sec. 85 of Bengal Act III of 1899 the Chairman can propose a candidate for appointment under Sec. 68 of that Act.

I understand that a contention has been raised that inasmuch as the explanation to Rule 21 says that "any *Commissioner* may propose, etc." the Chairman is excluded as he is not a *Commissioner*.

I do not agree with the view thus put forward. In my opinion, the word "Commissioner" in Rule 21 and

OPINION.—(*concld.*)

Sec 85 *Rules of Business Scope of expression 'Commissioner' in Rule 21* (contd)

the explanation to that rule is used somewhat loosely and is meant to include every member of the Corporation taking part *i e*, present at a meeting. If it is otherwise read, the Rule would be inconsistent with Secs. 79 and 81 of the Act. The Chairman is a member of the Corporation (Sec. 6) and as such has a right to vote under Sec. 79 on all questions brought before the Corporation at a meeting. He has a second vote, in all cases of equality of votes (Sec. 81). If the word "Commissioners" in the last sentence of Rule 21 is to be read as excluding the Chairman, then that rule will in effect override the two sections of the Act, *viz*, Sec. 79 and Sec. 81. To take an example. If at a meeting consisting of 12 Commissioners and the Chairman, 6 of the Commissioners vote for the appointment of candidate A, and the six others for candidate B, there is not an absolute majority of the votes of the *Commissioners* present and voting in favour of either candidate. If the Chairman can vote, and does vote in favour of A, there is an absolute majority. As I read the Act, the Chairman cannot be excluded from voting, but in the case supposed, Rule 21, if read strictly, will have that effect *i e.*, of overriding Secs. 79 and 81 of the Act.

If, on the other hand, the word *Commissioner* in Rule 21 is read as meaning members it is consistent with Secs. 79 and 81. So read, the word *Commissioner* in the explanation must also mean "member". In my opinion therefore the Chairman can propose a candidate for appointment under Sec. 68.

20th December, 1912. S. P. SINHA.

FURTHER OPINION.

Sec 85 *Rules of Business. Scope of expression. 'Commissioner' in Rule 21.* (concld.)

The special meeting of the 18th December, 1912 having been adjourned the business under consideration should be resumed from the point where it was left off.

The ballot papers should now be examined and the result declared. Unless the result is that one of the candidates has obtained an absolute majority of the votes the process of elimination should continue.

From what I have said above it follows that (*a*) Mr. Bertram's death since the last meeting does not affect the matter and his votes, if he did vote, must be counted, and (*b*) the fact that some Commissioners who were present at the last meeting may not be present at the next or that some who were absent at the last meeting may be present at the meeting cannot affect the voting which has already taken place.

From the printed proceedings of the last special meeting, it does not appear to me that the Chairman gave any definite ruling as to the point of order raised by Mr. Apcar. The subsequent discussion shows that it was not taken to be a ruling from the Chairman. The resolution also asks Counsel's opinion to be taken on the very point, which would hardly be consistent with there being a definite ruling from the Chairman.

4th January, 1913. S. P. SINHA.

Budget Estimates—Last date for the passing by the Corporation—"By" in Cl. (b) of Sec. 125 means "before."

CASE

Not available.

Sec. 125. *Budget Estimate. Last date. Meaning of the words "By 23rd of March."*

The facts were :—The Budget Estimates for 1912-13 revised by a Special Committee of the Corporation were presented to the Corporation on the 22nd April, 1911. The rate of taxation for the year was determined and the amount to be borrowed was settled. Further discussion of the details of the Budget was postponed to the next day.

The question then arose as to whether in view of the provisions of Cl. (b) of Sec. 125 of the Act to the effect that "if *by* the 23rd day of March the Corporation had not adopted any Budget Estimate, the Budget Estimate prepared by, or the last revised Budget Estimate submitted by the General Committee shall . . . . be deemed to be the Budget Estimate finally adopted" it was open to consider the Special Committee's Budget Estimate on the 23rd March.

OPINION

The Corporation not having adopted any Budget Estimate before the end of the 22nd March, the question is whether they can adopt any estimate on the 23rd, or whether the Budget Estimate submitted by the General Committee shall be deemed to be the Budget Estimate finally adopted.

The question depends on the meaning of the words "*by the 23rd of March*" in Clause (b) of the proviso to Section 125 of Bengal Act III of 1899. I am of opinion that "*by*" in that phrase means "*before*". It seems to me that the intention of the Legislature is that the Corporation should adopt the Budget between the 1st and

OPINION.—(*concld.*)

Sec. 125. *Budget Estimate. Last date. Meaning of the words "By 23rd of March" (concld.)*

the 23rd of March, *i e.*, they have 3 clear weeks from the 1st of March, for that purpose, and the 3rd week expires on the 22nd March. If the intention was to include the 23rd of March, the language would have been "on or before the 23rd" as in Section 124.

I am fortified in my view by that expressed in Angell on Limitation (Section 52) where it is stated that "*by* a certain day means *before* that day—the day, it seems, is excluded."

I am therefore of opinion that it is not open to the Corporation to adopt any Budget Estimate on the 23rd or any later date, and under the circumstances, the Budget Estimate submitted by the General Committee must be deemed to be the Budget Estimate finally adopted.

23*rd March*, 1911. S. P. SINHA

Gas works, meaning and scope of expression—Lamp posts etc., if "gas works" and if works of permanent nature.

CASE.

Secs. 129 & 105 (2) (i). *Lamp posts if "gas works" and if proper Loan charge.*

Calcutta is lighted mainly with gas supplied under contract with the Corporation by the Oriental Gas Company. The new contract with the said Company which comes into operation from 1st May, 1911, provides *inter alia* that the Corporation undertake at their own expense to supply, fix and maintain all lamp posts, brackets, lanterns, burners and mantles used in connection with the lighting of the City, the Company on their part supplying the gas manufactured in their works by mains and

CASE.—(*contd.*)

pipes laid and maintained by them and maintain all piping below and above ground up to the burners. The clauses 1 and 3 of the contract aforesaid may be referred to.

Secs. 128 & 106 (2) (i). *Lamp posts if "gas works" and if proper Loan charge.* (contd.)

Chapter VII of the Act (III B. C. of 1899) refers to the various Municipal Funds therein enumerated. Sec. 103 of the Act specifies the receipts and expenditures coming under the General Fund. Similarly Section 106 specifies the receipts under the Lighting Fund and provides among other things that the said Fund be debited with all expenditure for the efficient lighting of Calcutta and with the cost of establishment thereof.

Section 128 of the Act empowers the Corporation with the sanction of the Government of India to borrow any sum of money which may be required for the construction of works of a permanent nature under the Act.

In 1905 a reference was made to Mr. P. O'Kineally, the then Advocate-General.

For his opinion see pages 65 to 68 of Volume I of Legal Opinions and Rulings issued by the Corporation.

Question has now arisen as to whether the purchase and erection of lamp posts, brackets or lanterns or any one or all of them under clause 4 of the new contract with the Gas Company, if they are held by experts to be articles of a permanent nature, can be properly regarded as works for which money can be borrowed by the Corporation on debentures under Section 128 aforesaid.

The word "gas works" is not defined in the Act. But the attention of the learned Advocate-General is drawn to the definition of the word in Section 3 of the Gas Works Clauses Act 1847 (10 & 11 Vict. c. 15) where it is taken to mean "the gas works and the works connected therewith authorised by any special Act to be constructed."

CASE.—(*contd.*)

Secs 128 & 106(2) (i). *Lamp posts if "gas works" and if proper Loan charge.* (contd.)

Attention is further invited to the identical definition of the word "water works" in Sec. 3 of the Water Works Clauses Act 1847, to Vict. c. 17. It is submitted further that in Sec. 19 of the Gas Works Clauses Act aforesaid pipes, posts, plugs lamps, etc., are treated as coming under the definition of gas works. Secs. 1 & 18 of the Calcutta Gas Act [V (B.C.) of 1857) go on the same lines as the English Acts. Secs. 260 (1) & (4), 262, 263 & 264 of the Calcutta Municipal Act illustrating the distributive meaning put upon the word "works" in cases of "water works" and as including pipes, taps, fittings and other works *ejus dem generis* are referred to in this connection.

It is further submitted that the mere accident of gas being supplied by a private Company under arrangement with the Corporation does not and should not operate to exclude any item of gas work as defined in the Acts quoted above from the category of "Gas Works."

It is contended further that if the purchase and supply of lamps and posts, brackets and lanterns as integral parts of a gas installation by the Corporation be regarded as works of permanent nature as admitted by Mr. P. O'Kineally, then the mere fact that a part of the scheme for gas supply is in the hands of undertakers or private companies cannot render works, necessary for the completion of the whole installation of the same scheme but under the direct ownership of the Corporation, to cease to be "gas works." It is submitted that the mere fact of a division between the Corporation and the Gas Company of works coming under and forming part of one and the self-same scheme for the illumination of the city is a mere matter of arrangement and expediency and not one materially affecting the duties and rights of the Corporation under the Act with reference to the lighting of the city, and that any such arrangement cannot be regarded

CASE.—(*contd.*)

as removing such works done directly by the Corporation from the category of the various gas works comprised in the whole scheme.

Secs. 128 & 106 (2) (1) *Lamp posts of "gas works" and of proper Loan charge.* (contd.)

It is further contended that the Corporation as a matter of fact incurs all expenditure necessary for the purpose of a complete installation of gas works for the lighting of the city by agreeing to pay to the Company per light per annum a sum sufficient to cover the interest on the capital outlay—the annual Sinking Fund equivalent to the depreciation of the block of the annual expenditure for generation and distribution of gas and maintenance of the block together with a profit to the Company.

It is further contended that Mr. O'Kineally's assumption that the installation of gas works without lamp posts including lanterns, etc., would be a complete installation for the purpose of lighting the city was not justified by facts simply because lamp posts with lanterns are as essential works for lighting the city as the machinery for generation of gas and the pipes for distributing the same. It might therefore be a misnomer to apply the term maintenance to the supply of lamp posts with lanterns necessary for the complete installation.

The age or life of gas lanterns is certified by the Chief Engineer of the Corporation to be 30 years if properly maintained.

The Advocate-General will be pleased to advise :—

(a) Whether the purchase and supply and erection of lamp posts, brackets and lanterns as contemplated under Clause 4 of the Gas Contract can under the circumstances, come within the terms "gas works" in Section 106 of Act III B. C. of 1899.

(b) Whether under the circumstances of the case such purchase, supply and erection of gas

CASE.—(*concld.*)

Secs. 128 & 106 (2) (i). *Lamp posts if "gas works" and if proper Loan charge.* (contd.)

posts, brackets and lanterns forming an integral part of the scheme adopted by the Corporation for the illumination of the city in the discharge of the statutory duties imposed upon them can be regarded as works of a permanent nature within the meaning of Section 128 of the same Act and such outlay can justify borrowing on debentures issued under that Section.

OPINION.

(a) I am of opinion that lamp posts, brackets, and lanterns the purchase of which is contemplated by clause 4 of the contract, are "gas works" within the meaning of Section 106 of the Calcutta Municipal Act 1899. This Act contains no definition of "gas works" but posts and lamps are regarded by the Legislature as gas works in the Calcutta Gas Act 1857 (Sections 1 and 13), and I see no reason for excluding such an interpretation in the present case.

(b) The gas posts, brackets, and lanterns, the purchase, supply and erection of which form an integral part of the Corporation Lighting Scheme, can, in my opinion, be properly regarded as works of a permanent nature within the meaning of Section 128 of the Calcutta Municipal Act 1899, in view of the expert evidence as to the durability of such articles.

As the Corporation are, under Section 128, empowered to borrow money and secure the same by debentures for works of a permanent nature, it follows that, in my view, the Corporation would, in the circumstances, be legally justified in borrowing on debentures issued under that Section. Any distinction between laying a system of gas mains underground (which clearly would be within the Sections)

OPINION.—(*concld.*)

and the erection of a system of lamp posts, which are equally essential to the supply of gas for lighting purposes above the surface, does not appear to me to be tenable Nor, in my opinion, is it material whether the Corporation carry out their statutory powers and duties relating to the lighting of the city through their servants or employees directly or through contractors indirectly, or partly by the one method and partly by the other. The proper test seems to me to be; Is the constructive work relating to gas lighting of a permanent nature? If the answer be in the affirmative, the statutory borrowing powers of the Corporation to meet the contemplated capital outlay may be legally exercised.

Secs 126 & 105 (2) (i). *Lamp posts of "gas works" and of proper Loan charge.* (concld.)

G. H. B. KENRICK, K C,
2nd February, 1910. *Advocate-General*

Loans, Repayment of—Sinking Fund, contribution to—Yearly payment of portion of principal, proposal re:

CASE

Not available.

The opinion which is printed below was obtained in connection with the following letter from the Government of India prescribing certain conditions for the repayment of the loan for 54 lakhs raised by the Corporation in 1912.

Secs. 126 & 133. *Loans Repayment of.*

Letter No. 171, dated the 4th October, 1912, from the Government of India—received with letter No. 1125-T-M, from the Government of Bengal.

"I am directed to refer to the correspondence ending with the telegram from this Department No 149, dated the 30th August, 1912, conveying sanction to the raising by the Calcutta Corporation of a loan of Rupees 54 lakhs subject to the settlement of the terms of the loan.

CASE.—(*concld.*)

Secs 128 & 133. *Loans Repayment of* (contd.)

2 In this connection the Government of India consider it essential that arrangements should be made to repay the loan within a period of 30 years. The most convenient way of giving effect to this decision will, in their opinion, be to make special provision in the the Bill to amend chapter X of the Calcutta Municipal Act which was sanctioned in this Department letter No 127, dated the 24th July, 1912, for the repayment within 30 years of the present as well as of any other loans that may be raised by the Corporation with the sanction of Government It is desirable that the amending Bill with the suggested special provision should be passed into law as soon as possible. Pending the enactment of the Bill, the Government of India, in exercise of the powers vested in them by Section 128 of the Act, direct that besides paying into the Sinking Fund, in respect of this particular loan, the contribution of one per cent prescribed in Section 133 (2) (a), the Corporation shall also pay up and cancel every year such portion of the loan as will produce a result equivalent to the accumulation of the additional one per cent. into the Sinking Fund, which would otherwise have been required to ensure the complete repayment of the loan within the term specified "

OPINION.

Section 133 (2) (a) of Act III of 1899 requires the Corporation to pay into the Sinking Fund A, one *per cent.* on the *unrepaid balance* of *all* monies borrowed on debentures. It is at least doubtful whether the Government of India can under Section 128 require the Corporation to pay more than the one per cent. provided by Section 133. But, however that may be, I do not see how the Corporation can in the present instance carry out the direction of the terms now imposed by the Government of India (*vide* letter No. 171, dated 4th October, 1912). The loan has been raised, and debentures issued in the form prescribed by Schedule VI of the Act. There is no option reserved to pay up and cancel any portion of the loan at any time during the currency of the loan *i.e.*,

OPINION.—(*concld.*)

30 years and the debenture holders cannot be compelled to receive payment before the end of that period. I would suggest that the Government of India might be requested to reconsider the matter. They might very well leave the matter where it stands now and, if necessary, provide for the shortage apprehended in the proposed Bill.

Secs. 128 & 133. *Loans Repayment of.* (concld.)

13*th December*, 1912. S. P. SINHA

Borrowing Capacity—Limit of 10 *per cent of annual valuation—If gross valuation or only valuation of taxable property is meant*

CASE

Not available.

The opinion was obtained by Government and was forwarded by them with demy official letter No. 4-T.M., dated the 12th April, 1910.

Sec 131. *Borrowing Capacity.*

OPINION

I am of opinion that for the purpose of Section 131 of the Calcutta Municipal Act (Bengal Act III of 1899) the annual value of buildings and land which are not assessed or assessable to taxation should not be taken into consideration in calculating the ten per cent. limit. The value of buildings which being Municipal property are not valued, or which are exempt from assessment to the consolidated rate, are not, in my view of the Act, intended to be included in the value upon which the limit of ten per cent. is calculable.

The limit imposed on the borrowing powers of the Corporation is ten per cent on the annual value of land and buildings ascertained according to the principles laid down in Chapter XII of the Act. In my opinion this limit is ten per cent on the taxable, and not on the gross valuation.

19*th March*, 1910. C. H. B. KENRICK.
Advocate-General.

Loans, Repayment of—Sinking Fund moneys Application of—Trustees if entitled to use discretion or bound to comply with Corporation demands—Borrowing for repaying a previous loan purely matter for Corporation.

CASE.

Secs. 129 & 136. *Repayment of Loans. Application of Sinking Fund.*

In connection with the payment of loans due by the Corporation some difficult questions have arisen.

Powers are given to the Corporation to borrow money from time to time and provision has also been made for the discharge of loans.

The sections of the Calcutta Municipal Act bearing on the points are 128. 129, 133, 135, 136 and 139.

Section 128 empowers the Corporation to borrow with the sanction of the Government of India as therein mentioned any sum of money which may be required for the construction of works of a permanent nature.

Section 129 empowers the Corporation with the like sanction to borrow any money that may be required to pay any moneys for the time being due on any debentures as therein mentioned.

Section 133 provides for the maintenance of two Sinking Funds, Sinking Fund A and Sinking Fund B. The latter has ceased to exist as there is no longer any outstanding loan in respect of which that Sinking Fund was created.

Section 133 (2) (a) makes it obligatory on the Corporation to pay quarterly into Sinking Fund A a sum representing one per cent per annum on the unrepaid balance of all moneys borrowed on debentures issued after the 1st day of April, 1881.

Section 135 provides for the investment of all moneys paid into the Sinking Funds under the orders of the

CASE.—(*contd.*)

Secs. 129 & 136. *Repayment of Loans. Application of Sinking Fund* (contd.)

Corporation in Government Securities, Securities guaranteed by the Government or in Calcutta Municipal Debentures. So that even in the matter of these investments the Trustees cannot control the decision of the Corporation. The Trustees hold the moneys paid into the Sinking Fund subject to the orders of the Corporation as to their investment and Clause 4 of Section 135 shews that the Trustees are subject to the like orders of the Corporation in the matter of variation or transposition of any securities made over to them by the Corporation. The section clearly lays down that the securities should be held by the Officials therein mentioned as Trustees for the purpose of repaying at due date, from time to time, the debentures issued by the Corporation.

Section 136 provides that the Trustees may from time to time apply either Sinking Fund or any part thereof in or towards the discharge of the loan or part of a loan for which such fund was created and until such loan or part is wholly discharged shall not apply the same for any other purpose.

Section 137 provides for the submission to the Corporation by the Trustees of annual statement showing the particulars therein mentioned.

Counsel's special attention is invited to Section 129 and to the words "any money that may be required." Counsel will be pleased to consider who is to determine this requirement—whether the Trustees or the Corporation.

The Trustees of the Sinking Fund, it is submitted, cannot compel the Corporation to exercise this power to borrow money against the will and positive decision of the Corporation to the effect that no money is required to pay off a particular debt at due date inasmuch

CASE.—(*contd.*)

Secs. 129 & 136. *Repayment of Loans Application of Sinking Fund (contd.)*

as there is ample fund available in the Sinking Fund to pay off that debt. The Trustees contend that under Section 136 they have the option, by reason of the use of the word "may" therein, to apply any portion of the Sinking Fund or not for that purpose. It is submitted on the other hand that at due date the Trustees have no option but to apply the Sinking Fund in their hands so far as the same will suffice towards repayment of the loan. The option to pay out of the Sinking Fund or not can arise only when payment is sought to be made before the due date of any debenture. It should be noted that the Act does not require separate accounts for each loan to be kept, nor is a separate Sinking Fund prescribed for each loan. There is under the Act at the present time one Sinking Fund A for all outstanding loans.

It is submitted that the Corporation is as much interested as the Trustees in making lawful provisions for the discharge of the loans. The loans are liabilities of the Corporation and not of the Trustees. The Trustees' liability is confined to the extent of the amount of Sinking Fund in their hands. The Trustees have practically no active duties to perform save and except that at due date they must apply the Sinking Fund towards discharge of the debt falling due. They cannot, it is submitted, make the Corporation pay quarterly more than one per cent. as provided in Section 133 (a) and that if notwithstanding such payment the Sinking Fund be not sufficient to pay off all the the debentures falling due at a particular time it would be for the Corporation to borrow under Section 129; the Trustees would have no responsibility if the amount avilable in the Sinking Fund be insufficient to pay off a loan provided they have not been guilty of any misapplication of such fund.

CASE.—(*contd.*)

Secs. 129 & 136. *Repayment of Loans. Application of Sinking Fund.* (contd.)

The facts of the case are as follows :—

There will be in the Sinking Fund A in November, 1911, a sum of Rupees between 35 and 36 lakhs and on the 1st December, 1911, Municipal Debentures to the extent of Rs. 20 lakhs will become due. The next loan will not fall due till 1915.

Counsel will be pleased to refer to the correspondence set out in the proceedings shewing the position taken up by the Corporation and the Trustees respectively both on financial and legal grounds. It is no doubt a defect in the Act itself which has brought about all this complication and friction and it is submitted that the remedying of such defect is for the Legislature and not for the Trustees or the Corporation. The latter is a creature of the statute and cannot assume the functions of a legislator.

Having regard to these circumstances, Counsel will be pleased to advise :—

(1) Whether the Trustees have the power to withhold payment of 20 lakhs or any portion thereof out of the sum of 35 or 36 lakhs, now held by them on account of the Sinking Fund for the purpose of repaying at due date i. e., the 1st day of December, 1911.

(2) Whether the Trustees can compel the Corporation to borrow as suggested by them in their letter, dated 26th June, 1911, against the decision of the Corporation to the contrary, in view of the fact that there is an amount in the Sinking Fund more than sufficient to pay off the loan.

(3) Should Counsel be of opinion that the Trustees cannot withhold payment as aforesaid and assuming that the Trustees do not yield to the suggestion of the Corporation, what is the remedy of the Corporation against the Trustees?

CASE.—(*concld.*)

Secs. 129 & 136. *Repayment of Loans Application of Sinking Fund.* (contd.)

And generally as to the rights and duties of the Corporation and the Trustees in the matter of the repayment of Municipal Loans.

OPINION.

(1) The answer to question (1) depends upon whether the Trustees under Section 135, have under Section 136, an absolute discretion as to the application of the Sinking Fund or any part thereof. They rely upon the word "may" occurring in Section 136 and contend that it is an enabling and discretionary power. But it has been long settled [*vide* Julius *vs* Bishop of Oxford 5 App. (as 223)] that phrases which in their ordinary meaning are merely enabling are to be construed as obligatory under certain circumstances. Here a power is deposited with public officers for the purpose of being used for the benefit of persons who are specifically pointed out and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise. It seems to me that the Trustees hold the Sinking Fund for the benefit of the Corporation though the Corporation by the terms of the Act is restricted to using that fund for the one purpose *viz*, repayment of loans. The Trustees are under an obligation to invest the money under the orders of the Corporation and to vary or transpose them under similar orders (*see* Section 135). They are liable further to furnish accounts to the Corporation (Sec. 137) and it is conceded that if the Trustees were to apply the whole of the Sinking Fund for the repayment in full of Debentures which have matured, other Debenture-holders could not restrain them from doing so or hold them liable for breach of trust. Under

OPINION.—(*concld.*)

these circumstances it seems to me that the Corporation and not the Debenture-holders is the person entitled to call for the exercise of the power conferred by Section 136. The condition upon which the Corporation is entitled to call for its exercise is that a loan in respect of which the Sinking Fund was created, has fallen due.

Secs. 129 & 136. *Repayment of Loans. Application of Sinking Fund.* (concld.)

My answer therefore to the first question is that the Trustees have not the power which they claim.

(2) No. The Corporation with the sanction of the Government of India determines what moneys are required to be borrowed for the purpose of paying off debentures and the Trustees have no voice in the matter.

(3) The remedy of the Corporation if the Trustees prove recalcitrant is either by suit or by an application under Section 45 of the Specific Relief Act.

Generally, I have nothing to add.

18*th August*, 1911. S. P. SINHA

Debentures, Form of—Endorsements or Issue of scrip to two or more persons with alternative provision of payment to or to the order of any one of them or to survivor if permissible.

CASE.

1. Whether having regard to the form of the debenture (*vide* Schedule VI of the Act and Sec. 132) a debenture could be issued payable to A & B or survivor or as suggested by the Bank (*vide* their letters dated 17th February, 1912 & 20th October, 1908).

Sec. 132 & Schedule VI. *Endorsement on Debentures.*

CASE.—(*concld.*)

Sec. 132 & Schedule VI. *Endorsement on Debentures.* (concld.)

Letter dated 17th February, 1912, from the Bank of Bengal.

The question has recently been raised as to whether endorsement in alternative forms such as :—

Pay to A. and B or either

Pay to A B and C. or the order of any one of them

are effective and I shall be glad to receive your instructions regarding the accepting of such endorsements on Municipal Debentures both as regards new endorsements as well as of those already recognised by payment of interest, etc

Letter dated 20th October, 1908, from the Bank of Bengal.

With reference to my letter No. 93-M , dated 5th June, and your reply thereto, dated 8th September last, I beg to state that I have not yet received your instructions as to whether Municipal Debentures can be endorsed.

"Pay to A and B or Survivor "

Further, I beg to enquire whether, in order to popularise the Security, there be any objection to holders endorsing Municipal Debentures in any of the ten methods permissible to owners of Government promissory Notes, under Section 184, Civil Account Code.

2. Whether a holder of a debenture is competent to endorse sub debenture in the alternative forms as suggested by the Bank as above.

OPINION.

1. The Corporation cannot depart from the form prescribed.

2. The Corporation by paying to the holder for the time being would get a discharge. I think an endorsement by the original payee to *A and B* or either is a valid endorsement.

21*st June*, 1913. B. C. MITTER.

Loan Business of the Corporation—Agreement with Bank of Bengal—Bank's responsibility in case of loss

CASE

Not available.

Loan business. Agreement with Bank of Bengal

The following opinion was obtained in connection with the proviso in clause 1 proposed by the Bank of Bengal in the draft agreement, read with clause 5. These two clauses are reproduced.

1. The Bank shall, during the continuance of this agreement, act as Agents of the Corporation in and for the management and transaction of all business connected with the existing debenture loans of the Corporation mentioned in the several parts of the Schedule A hereto annexed and of all other debenture loans which hereafter during the continuance of this agreement shall be raised and issued by the Corporation in accordance with the provisions of the Calcutta Municipal Act, 1899, or any other enactment empowering them in that behalf and shall manage and transact such business subject to such directions as may from time to time be given in writing to the Bank by the Corporation or their Chairman or other sufficiently authorised representative for the time being thereof and as may be consistent with the provision hereof provided always that *nothing herein contained shall render the Bank's responsibility greater or other than that of a Banker to an ordinary customer, and under the Negotiable Instruments Act.*

5. The Bank shall be responsible to the Corporation for all loss or damage that may arise or be occasioned to the Corporation by any theft, fraud or wrongful act, error in calculation or other mistake done or committeed by the Bank or any of their officers or agents in managing and transacting the business aforesaid and the Bank shall indemnify the Corporation in respect thereof.

OPINION.

Loan business Agreement with Bank of Bengal (contd.)

"I understand that all I am asked to do is to express my opinion upon certain questions relating to the Proviso with which clause 1 of the draft agreement concludes, the Proviso being in these words:

"Provided always that nothing herein contained shall render the Bank's responsibility greater or other than that of a Banker to an ordinary customer, and under the Negotiable Instruments Act."

And the questions submitted being the following:—

(1) Whether the Proviso controls the whole agreement, especially clause 5, or not?

(2) And what is the effect of the Proviso as to the Bank's responsibility?

(3) Whether the Corporation can safely accept the Proviso as it is?

(1) As a question of construction, the Proviso, in my opinion, *prima facie* controls the whole agreement. But such a construction would apparently render the Proviso and the subsequent clause 5 under possible circumstances, inconsistent with each other. Under clause 5 construed by itself, irrespective of the Proviso, the Bank might come under a responsibility to the Corporation from which the Proviso construed by itself, irrespective of clause 5, would protect it, and in the face of this ambiguity the proper construction of the agreement, I think, must be that a responsibility which is *prima facie* within clause 5 construed by itself only, would not be affected by the Proviso. In other words the Proviso is to be construed as applying only to responsibilities falling within the language of both the Proviso and clause 5; and if this is the correct construction of the agreement the operation of clause 5 is not controlled by the Proviso.

But this question of the construction of the agreement must be regarded as a doubtful one; and the position of

OPINION.—(*contd.*)

Loan business. Agreement with Bank of Bengal (concld.)

the Corporation under the agreement ought not to be subject to uncertainties of construction. The meaning of the agreement ought to be made clear and unambiguous

(2) I do not know what the Proviso means. It is not clear to me that it has really any ascertainable meaning at all and it appears to me altogether a matter of uncertainty what meaning might be given to it in case the question should arise.

The Corporation cannot be advised to be party to a legal instrument upon the face of which important questions like those under consideration are left open to doubt The agreement ought to be altered so as to express clearly and with certainty what the parties to it really mean. Or if there is a difficulty about this, perhaps the best course would be to let the agreement be silent upon points about which the parties cannot agree as to the form the Agreement should take—leaving their rights and obligations between themselves such as the law in the absence of express stipulation between them would determine them to be.

(3) In my opinion the Corporation cannot safely accept the Proviso as it is.

9th February, 1912. THOS R. STOKOE

Filtered Water Supply to Huts

CASE

Secs. 248, 249, 253 & 283. F. W Supply to Huts.

Questions have arisen with reference to the supply of filtered water to individual huts in a bustee and to huts which are not situated in any bustee.

The provisions of the Calcutta Municipal Act bearing on the question can be gathered from the following sections of the Act :—

Sec. 3 (5) defines bustee. Sec. 3 (6) defines bustee land. Sec. 4 empowers the General Committee to de-

CASE.—(*contd.*)

Secs 248, 249, 253 & 283. *F. W Supply to Huts.* (contd.)

cide whether land is a bustee or bustee land. Sec. 3 (30) defines occupier. Section 32 defines owner. Sec 151 lays down the principle and method of assessment as to land and buildings and bustees. Secs. 171 and 180 provide for payment of the rates. Sections 248, 249, 253 refer to supply of filtered water. Sec. 259 prescribes the size of ferrules as per Schedule XIV. Schedule XIV fixes the size on the basis of the annual value of the building as determined under Chapter XII. Sections 270 and 271 provide for the fixing of meters and payment for excess supply.

Sections 283 (b) and (2) (3) should be noted shewing the existence of filtered water supply in bustees and under (3) the supply, if cut off, should be restored on payment of all dues and expenses of cutting off the water. This might relate to connections in a bustee allowed before the coming into operation of this Act, and it is doubtful whether it can be construed by implication to permit of connection for filtered water supply being given to huts in a bustee under the provisions of the present Act.

It is submitted having regard to the provisions of Secs. 249 and 250, it is doubtful whether filtered water supply to individual huts in a bustee was ever contemplated by the Legislature. The practice hitherto has been to allow filtered water connection in the case of masonry buildings only and *not* in the case of huts in a *bustee*. In bustees, however, filtered water is supplied by means of hydrants placed in bustee streets or passages at certain distances. No charge is made for this supply through hydrants.

Having regard to the free allowance of filtered water as prescribed by Section 248 and having regard to the principle and method of assessment contained in Section 150 and the payment of rates in Section 180 by the owner of

CASE.—(*contd.*)

Secs. 248, 249, 254 & 283. *F. W. Supply to Huts.* (contd.)

the bustee, it seems almost impracticable to fix the quantity of supply for a particular hut in a bustee and to regulate the supply.

It is also to be noted that unless the quantity to be supplied free could be ascertained, no meter could be placed for charging for excess consumption of water.

Section 271 makes the occupier liable for the excess consumption. Therefore in the case of occupiers of huts in a bustee where individual huts are not separately assessed and having regard to the payment of rates by the owner of the bustee under Section 180, it seems that the Municipal authorities have no power (even if they be willing to do so) to provide for the supply of filtered water to individual huts consistently with, and pursuant to the provisions of the Act.

The owner of the bustee may claim a supply of filtered water and the size of the ferrule is to be fixed and ascertained under Section 259 on the basis of the assessment of the whole bustee, but it would not be possible to make him liable for any excess consumption under Section 271, as under that section the occupier is made liable therefor.

Counsel will be pleased to advise—

1. Whether, having regard to the provisions of the law above referred to, a supply of filtered water can lawfully be given in a bustee, the ferrule to be allowed being determined on the footing of the valuation or assessment of the bustee and the quantity of free supply being ascertained on the footing of the water rate payable on account of the bustee as a whole and a meter affixed for purposes of charging for excess consumption. If so, who is liable for such excess consumption?

2. Whether individual huts in a bustee can be given filtered water supply, and if so, how (on what basis or

CASE.—(*concld.*)

Secs 248, 249, 253 & 283.
F. W Supply to Huts (contd.)

footing) is the quantity of supply to be given free and the size of the ferrule to be ascertained?

3. Whether the occupier of a hut which is not situated in a bustee is entitled to a supply of filtered water?

4. As "building" includes a hut, whether the Chairman may require the owner of a hut to obtain supply of filtered and unfiltered water under Section 253?

OPINION

1. I am of opinion that a supply of filtered water should be given to bustees by means of hydrants or public standposts as required by Section 238 of the Calcutta Municipal Act. The occupiers of individual huts in a bustee are not, in my opinion, entitled to demand a supply of filtered water through a ferrule. Sections 249 and 250 contemplate the laying down of service pipes for the supply of filtered water in masonry buildings only, and are not applicable to huts in a bustee. On the other hand Section 283 (b) and (2) and (3) seems to contemplate a supply of water in a bustee in some cases, and the restoration of such supply after it has been cut off for non-payment of rates, but these provisions do not appear to me to give the occupiers or owners of huts in bustees the benefit of the provisions of Sections 249 and 250.

Under Section 270 there is power to attach a water meter only when there is reason to believe that more filtered water is being consumed by an occupier than he is entitled to under Section 248. This right to receive filtered water supply enures under Section 248 only to the occupier of a building connected with the water-supply and (under Sec. 271) it is the occupier who is liable for any excess of the statutory allowance of filtered water when a meter has been attached. In the case of bustee

OPINION.—(*contd.*)

Secs 248, 249, 253 & F. W. Supply to Huts. (contd.)

huts the owner and not the occupier is liable to the consolidated rate. These provisions, in my opinion, indicate that a supply of filtered water to individual huts in a bustee is not within the contemplation of the Act. In special cases, however, the Chairman would no doubt have power to require the owner to obtain a supply as provided by Section 253.

2. For the reasons above indicated, I am of opinion that the Municipal Act imposes no duty to give a supply of filtered water to individual huts in a bustee, the provisions of Sections 249 and 250 as to laying down service pipes being limited to masonry buildings. Though there is no duty, the Chairman in exceptional cases is empowered by Section 253 to order a supply of filtered water in any building which is without a proper supply, and as the term building includes a hut, it would seem that if he thought proper he could exercise such power in the case of huts in a bustee. In such case, having regard to the special rating provisions as to occupiers and owners of bustees, it would apparently be necessary, if Sec. 248 is at all applicable, to treat the bustee owner as the occupier as regards liability for payment in respect of consumption in excess of that allowed by Section 248, though upon a strict interpretation of the Act there is no power to require any payment for excess in such a case.

3. The occupier of a hut, which is not situate in a bustee, does not come within the provisions of Sections 249 or 250 which enable the occupier of a masonry building to lay down service pipes or to require the owner to do so, and is not therefore, in my opinion, entitled to demand a service supply of filtered water, though the Chairman's discretionary power under Section 253 might apply to such a case.

4. I am of opinion that under Section 253, when any hut is without a proper supply of water and there is a

OPINION.—(*concld.*)

Secs. 248, 249, 253 & 283. *F. W. Supply to Huts.* (concld.)

main within 100 feet from such hut, the Chairman may, in his discretion, give notice requiring the owner to obtain the supply and execute the necessary works, unless the owner can prove his inability by reason of poverty. The term "any building" comprises a hut. But if such a supply be given, there appears to be no power to enforce any payment for excess of the statutory water allowance when the hut is in a bustee and so subject to the special rating provisions

6th October, 1910. G. H. B. KENRICK.
Advocate-General.

Laying six feet Steel Main in Chitpore Railway Yard—Position of the Corporation and E. B. S. Railway

CASE

Secs. 281, etc. *Steel main in Chitpore Railway yard.*

In connection with the new elevated Reservoir being constructed at Tallah for the purpose of securing better filtered water supply to the city, it is necessary to lay a steel six feet water main from Tallah to Sham Bazar and proceeding thence to Wellington Square. This, coupled with the reservoir, will, it is believed, relieve the city of the crying need of a better pressure in its water supply. The main would, as originally proposed, cross the Chitpore Yard belonging to the E. B. S. Railway by the Railway bridges attached thereto. But owing to the extension of the said bridges by the Railway Authorities the original proposal to carry the main over an independent bridge would have under the changed circumstances, involved considerable expenditure. Accordingly, it was proposed to run the main under the Railway lines and sidings, and to safeguard the interests of the Railway and further to prevent all possible accidents, it was suggested by the Chief Engineer to the Corporation to have a steel cover of three feet over the main, and to encase the said main in twelve inch cement concrete. In reply

CASE.—(*contd.*)

Secs. 281, etc. *Steel main in Chitpore Railway yard.* (contd.)

to this proposal, the Engineer in charge of the E. B. State Railway stated that he had no objections thereto, but he wanted to impose certain further conditions as to the cement casing, to prevent a possible burst. The Chief Engineer to the Corporation in reply pointed out that the precaution against the burst was wholly unnecessary and unknown in the history of steel mains but agreed to have a rectangular base as suggested by the Railway Engineer. The Manager E. B. S. Railway was not however assured of the safety of the Railway line under the conditions proposed, and laid the matter before the Railway Board. The Chief Engineer in reply referred to the practice obtaining in England of steel mains being permitted under railway lines and proposed additional precautions to safeguard the interests of the railway. In reply the Officiating Manager wrote to the Secretary Calcutta Corporation on the 19th November, 1909 enclosing an extract from the letter from the Railway Board. The said letter containing the terms imposed by the Railway Board are set out below :—

Extract from the Railway Board's letter No. 2748, *dated the* 30*th September,* 1909 *to the Manager E. B. S. Railway.*

"In the opinion of the Railway Board the proposed main should not be permitted to run across the Chitpore Yard unless there is no other reasonable way of dealing with the conditions of the case.

They leave the decision on this point to you (Manager E. B. S. Railway).

2. If it is finally decided that the main may run across the yard you should agree to this being done only on the following conditions :—

(1) That the Municipality are to be liable for all damage, loss and deterioration to Railway

CASE.—(*contd.*)

Secs. 281, etc. *Steel main in Chitpore Railway yard.* (contd.)

property and for all loss that may occur in Railway earnings and for all claims that may be legally established against the Railway Company in the event and by reason of any accident happening to the main or any defect that may occur in its working

(2) That the Municipality will undertake to make any alterations to the main in the event of the Railway considering that the existence of the main was detrimental to their interests.

(3) That the work of constructing the main shall be carried out so as to cause no interference with the traffic of the Railway."

In reply, the Chief Engineer to the Corporation expressed his agreement, if necessary, with clauses 1 and 3 imposed by the Railway Board though at the same time pointing out that no accident could possibly occur to a main designed as the present. The Engineer objected to clause 2 as not being fair that the Corporation should agree to alter such a large main as the present on which the whole water supply of the city depended in the event of the railway considering the existence of the main detrimental to their interests. In reply, the Officiating Manager, E. B. S. Railway referred to the importance of the Chitpore Yard on which the whole of the rail-borne Jute trade of Calcutta depended in addition to other traffic, and pointed out that condition 2 was in accordance with Section 8 of the Railway Act IX of 1890, suggesting that the Corporation should agree to the conditions.

Question has arisen whether there is any objection to the Corporation accepting the conditions sought to be imposed by the Railway Board, it being borne in mind that

CASE.—(*contd.*)

Secs. 281, etc. *Steel main in Chitpore Railway yard.* (contd.)

the E. B. S. Railway is a State Railway, and that in questions of disputes appeal can always be made to the Government. There is very little likelihood of any expenditure contemplated in clauses 1 and 3 of the conditions being incurred. But it is submitted that contingency might conceivably arise and the expenditure especially under conditions 1 and 2 "to make good all damages, loss or deterioration to the Railway property and Railway earnings" and to alter the main would be very heavy. As regards condition 2, question also has arisen whether by agreeing to the same the Corporation would be committed to anything which they should not be committed to, regard being had to the powers and liabilities of the Corporation under the law.

Under Section 281 of the Calcutta Municipal Act, (III B. C. of 1899) the Corporation have in the matters of water supply the same powers and are subject to the same restrictions as in the case of drainage both within and outside Calcutta. Sec. 294 of the Act may also be referred to in this connection. Then Section 285 empowers the Corporation to lay pipes outside Calcutta in order to bring water into Calcutta, and in respect of the country through which such pipes may pass, the Corporation have the same powers as inside Calcutta. Sec. 290 of the Act authorises the Chairman to carry any Municipal drain through or under any land within or without Calcutta. The effect of all these sections taken and read together is, it is submitted, that after the sanction by the Local Government (as has been already obtained for the present scheme) the Corporation may lay water pipes under any land outside Calcutta.

A consideration of the Railway Act IX of 1890 will, it it submitted, bear out the above interpretation. Sec. 12 of this Act contemplates that a local authority may construct a road or other works across or under any Rail-

CASE.—(*concld.*)

Secs. 281, etc. *Steel main in Chitpore Railway yard.* (contd.)

way property. Though under Sec. 8 of this Act the Railway Administration may alter the position of any pipe for the supply of gas, water etc., but it can do so only at its own cost. Such diversion has further to be done, it is submitted, to the satisfaction of the local authority concerned. The Advocate-General will be pleased to advise on an interpretation of the different powers vested in the Corporation and the E. B. S. Railway under the Calcutta Municipal Act (III B. C. of 1899) and the Railway Act (IX of 1890).

(a) Whether the Corporation may accept the conditions 1 and 3 of the Railway Board as set out in the letter No. 2748-R.C., dated 30th September, 1909 to the Manager E B. S. Railway?

(b) Whether by accepting the condition No. 2 of the same, the Corporation would be committed to any thing which they should not, in view of the legal powers involved in the question, be committed to, regard being specially had to the contingency of the enormous expenditure that will be entailed in case of a possible burst however inconceivable such an accident may be?

OPINION.

(a) In my opinion the first condition should not be accepted by the Corporation without some modification, as it imposes potentially an unreasonably wide liability on the Corporation. As it stands, the Corporation assume liability to idemnify the Railway Company in respect of all claims whatever which may be made against the Company in the event of any accident to the proposed water main. I should advise the Corporation for their own

OPINION.—(*contd.*)

reasonable protection to insist, at least, that the words 'legally established" be substituted for the word "made" and the words "and by reason" should be inserted after the word 'event" and before the word "of" in the first condition as drafted.

Secs. 281, etc *Steel main in Chitpore Railway yard.* (contd.)

(b) I am of opinion that the Corporation would not be justified in accepting the second condition. The Railway Company has express power under Sec. 8 of the Indian Railway Act 1890 to alter the position of any water pipe after notice, and such alteration must be executed to the reasonable satisfaction of the Corporation. It follows that the cost of any such alteration in the exercise of the powers conferred by the Indian Railways Act must be borne by the Railway Company. This being so, it is inadvisable that the Corporation should undertake to make any alterations to the main in the event of the Railway considering at some future time that the existence of the main was detrimental to their interests.

I see no objection to the Corporation assenting to the third condition which is for the reasonable protection of the Railway.

This opinion is based on the assumption that the Corporation has statutory powers enabling them to run their mains under the Railway lines and sidings without obtaining the sanction of the Railway Company. If on the other hand there is no such power and the authorisation of the Railway is first essential then the Railway Company might impose such conditions as it thinks fit. In this event the second condition would have to be accepted, and Section 8 of the Railways Act would be displaced by contract.

G. H. B. KENRICK,
Advocate-General.

21*st January*, 1910.

OPINION.—(*contd.*)

Secs. 281, etc. *Steel main in Chitpore Railway yard.* (contd.)

Since writing the above opinion, I have discussed the matter with Sir T. R. Wynne, the President of the Railway Board. He seems disposed to accept my suggested modification of condition (1); but attaches importance to the second imposed condition, in view, as he pointed out, of a possible fracture or displacement of the water main as the result of earthquake, which might flood the Railway lines and cause loss by impeding traffic.

He, however, agrees with me that if it can be shewn that the Corporation is expressly empowered by legislation to lay its mains under the lines of a Railway Company irrespective of the sanction of the Company (as to the existence of which power I am doubtful) the Railway could not insist on imposing the second condition on the Corporation.

G. H. B. KENRICK,

5th March, 1910. *Advocate-General.*

On further examination of the Calcutta Municipal Act, I find that the Corporation have the same powers for carrying water-mains within or without Calcutta as they have for carrying drains (Section 281) and they have power after giving reasonable notice to the owner or occupier (under Section 290) to carry drains into, through or under any land whatsoever within Calcutta or for the purpose of outfall or distribution of sewage without Calcutta. These sections appear to me to empower the Corporation to carry their water main under the lines of the Railway Company after giving reasonable notice in writing to the Company. This removes the doubt which I have expressed above, and in my opinion, provided

OPINION.—(*concld.*)

that the Corporation exercise their powers reasonably, they can do so without first obtaining the sanction of the Railway Company.

Secs. 281, etc. *Steel main in Chitpore Railway yard.* (concld.)

G. H. B. KENRICK,
Advocate-General.

19*th March*, 1910.

It has been pointed out to me that in my former opinion on this matter I have used the words "Railway Company." I am fully aware that the E. B. S. Railway is owned and administered by the Government, and this fact in no way modifies the views which I have already expressed.

By Sec. 290 (1) of the Cal. Municipal Act the Corporation are empowered to carry any municipal drain "into, through or under any land whatsoever," and under Sec. 281 they have the same power with regard to water mains. The words "any land whatsoever" are sufficiently wide to include, and in my opinion they do include any land vested in the Government. So far as I am aware there is no provision in the Railay Act which restricts the operation of the powers of the Corporation under the Act of 1899.

G. H. B. KENRICK,
Advocate-General.

27*th May*, 1910.

Culverts over Road side drains—Fee for written permission for, Legality of—Powers of Removal.

CASE.

Section 292 of Act III (B.C.) of 1899 of the Calcutta Municipal Act provides that:—

(1) Without the written permission of the General Committee no railway or private street shall be constructed

CASE.—(*contd.*)

Secs. 292, 341, 342 & 586. *Culverts. Fees for permission and powers of removal.*

and without the written permission of the Chairman no wall or other structure shall be newly erected over any Municipal drain.

(2) If any railway or private street be constructed, or if any wall or other structure be erected without the permission required by sub-section (1), the Chairman may with the approval of the General Committee remove or otherwise deal with the same as he may think fit and the expense thereby incurred shall be paid by the person offending.

Sec. 336 of the Act runs as follows :—

"All public streets and squares not being the property and kept under the control of the Government or the Commissioners for the Port of Calcutta (1) including the soil, and the side-drains, footways, pavements, stones and other materials of such streets and squares and all erections, materials, implements and other things provided for such streets or squares, shall vest in and belong to the Corporation."

Section 341 of the same Act provides for the removal or alterations of fixtures attached to a building so as to form part of the same and causing a projection, encroachment or obstruction over or on any public street or land vested in the Corporation on written notice by the General Committee of the said Corporation. Sub-Section (3) of the Section lays down that if the owner or occupier of the building proves that such structure was erected before the 1st day of June, 1863 or after such date with the consent of any Municipal authority duly empowered in that behalf, then the Corporation shall make reasonable compensation to every person who suffers damage by such removal or alteration of the fixture.

Section 342 of the Act runs as follows :—

"342. (1) The Chairman may remove any wall, fence, rail, post, platform or other obstruction, projection or

CASE.—(*contd.*)

encroachment (not being a fixture referred to in Section 341) which has been erected or set up, and any materials or goods which have been deposited in a public street or in or over any drain or aqueduct in a public street, whether the offender be prosecuted or not.

Secs. 292, 341, 342 & 586 *Culverts. Fees for permission and powers of removal.* (contd.)

(2) When the Chairman removes any wall, or other obstruction, projection or encroachment from land which forms part of a public street no compensation shall be payable, but the General Committee shall be bound to provide proper means of access to and from the street if none exist already."

Public street is defined in Section 3 (37) and includes the side drains attached thereto. The word fixture in Section 341 has not been defined in the Act.

Section 586 provides for the granting of license or written permission and the charging of fees for such licenses or written permissions.

In Calcutta especially in the southern portion of the town there are still in existence open side-drains between the premises situate at the side of streets and the street proper. To secure access from the street proper in to the premises there exist masonry culverts, platforms and other contrivances attached to the buildings or resting on the land as the case may be. The culverts, platforms and other contrivances belong to the owners of the buildings or lands.

Most of these culverts and other structures are encroachments and obstructions over the drains; and the General Committee of the Corporation have taken steps under Section 341 of the Act coupled with Section 450 of the Act for their removal. In cases where these structures are merely culverts serving as a means of access to the premises and which are not found to be obstructions over the drain, the same were allowed to re-

CASE.—(*contd.*)

Secs. 292, 341, 342 & 586. *Culverts. Fees for permission and powers of removal.* (contd.)

main on the owner executing an agreement undertaking to pay a nominal rent and acknowledging the rights of the Corporation to or over the drain.

On the 29th April, 1909 the Corporation by a resolution under Section 586 of the Act proposed to fix a fee of Re. 1 per annum for written permission within the meaning of Section 292 of the Act for culverts and other structures and to discontinue the former practice of enforcing written agreements for allowing these structures to remain.

The competency and legality of charging any fee for granting this written permission in respect of such culverts or other structures used as a means of access to such buildings or lands and for granting any written permission therefor have been questioned.

The contentions against the proposal for granting written permission levying any fee may be summed up as follows:—

1. That the Municipal authorities are bound to afford proper means of access to and from the street if they remove or cause to be removed any culvert or other structures which serve as a means of access only to premises abutting on roadside drains.

2. The right of access from private property to a public thoroughfare or street is a right incident to the ownership of land abutting thereon and any interference with the right causing damage (when physical access from the land is taken away or rendered less convenient) entitles the owner to compensation, and under Section 342 (2) to a proper means of access being provided by the General Committee if by reason of the removal of such culvert or structure the means of access be cut off.

3. That a "public street" as defined in the Act means any street, road, etc., over which the public have a right

CASE.—(*contd.*)

of way and includes a drain attached to such street, and that the drain therefore must *prima facie* be taken to be part of the public street. Reference is also sought in this connection to the case of Imadul Huq *versus* Corporation of Calcutta, I. L. R. 34, Calcutta 847.

Secs. 292, 341, 342 & 586. *Culverts. Fees for permission and powers of removal.* (contd.)

4. That the right of use of the public street is an universal common law right carrying with it the right of passage over the roadside drain forming part of the street and that no license is necessary for the exercise of such a right.

5. That it follows as a corollary to the right of passage that the adjoining owner should have the right of providing means of access over such drain to the road proper, and that this right has been recognised in the last para. in Section 342 of the Act, which imposes on the General Committee the duty to provide proper means of access to and from the street, if none exists already.

6. That Section 292 (1) is not intended to apply to structures over roadside drains put up as a means of access to the adjoining premises, as such a right cannot depend upon the sufferance of the Municipality.

7. That Section 586 does not justify the levying of a fee in such a case. The Section applies in cases where a license or written permission is required and the same must be for a specified period and subject to certain conditions and restrictions and is further liable to be suspended or revoked. The section is therefore inapplicable to the exercise of an absolute and an indefeasible right, such as the right of the public over a public high way, a right which from its nature cannot be subjected to any such restrictions.

On the other hand it is contended that every Municipal Law is more or less a restriction on the common law rights of individual owners of property, [illegible] by the

CASE.—(*contd.*)

Secs. 292, 341, 342 & 586 *Culverts. Fees for permission and powers of removal.* (contd.)

Legislature for the necessities of civic and corporate life, and that a special Act like the Calcutta Municipal Act in the absence of any express reservation should be deemed to have modified the general common law rights, if any, touching any matter dealt with by the Municipal Law. In other words, the provision of the special Act will prevail over the provisions of a general Act or any unwritten law, custom or right.

Section 341 of the Act relates specifically to fixtures attached to a building so as to form part of the building causing a projection, encroachment or obstruction over or on any public street or land vested in the Corporation and Section 342 deals with wall, fence, rail, post, platform or other projections, encroachments, or obstructions (not being fixtures referred to in 341). These are structures or impediments not structurally connected with any building and placed in a street (*in* not *over* or *on* as in Sec. 341) or in or over any drain.

Section 337 should also be noted imposing on the General Committee the obligation of maintaining public streets, bridges and culverts. Reference may be made to Sections 87, 119, 129 of the Metropolis Management Act 1855, 18 and 19 Vic. C. 120; 199 of the London Building Act, 1894; Sections 65, 70, and 79 of the Metropolis Paving Act; 57 Geo. III c 29 known as Michael Angelo Taylor's Act.

It is submitted that these sections including Sections 341, 342 of the Calcutta Municipal Act aim at alteration or removal of structures or things which impede or hinder or are likely to impede or hinder public traffic or to affect public convenience or safety, or in other words their removal or alteration is enforced in the interest of the public convenience and safety to make the public street

CASE.—(*contd.*)

Secs. 292, 341, 42 & 586. *Culverts Fees for permission and powers of removal.* (contd.)

or land vested in the Corporation as free from obstructions and as commodious as practicable, and as may be necessary for all Municipal purposes.

As to what extent the soil under and the air space over streets and drains vest in the Corporation, it is very difficult to determine.

Sec. 336 vests the public streets including the soil in the Corporation, but as regards the vesting of public drains Section 286 does not refer to soil at all.

It is still open to doubt whether soil includes sub-soil for there are cases shewing that soil means surface of the land and does not include minerals. Whereas subsoil includes all that is below the surface down to the centre of the earth. Wakefield *vs* Bucclench 36 L. J. ch 179; Cox *vs*. Ghee 17 L. J. C. P. 162.

It is difficult to determine what proprietory interest the Corporation has in the air above and in the soil below public streets. But there is no doubt that the Corporation has such an interest both in the soil below and in the air above public street as is necessary for municipal purposes, that is to say, for the control, protection and maintenance of the streets, the drains and sewers, the water mains, gas mains and pipes and electric mains, etc. and for all other purposes incidental thereto respectively. (Finchley Electric Light Company *vs* Finchley Urban District Council, 1903 Ch. 437.)

It is further contended that the words as to the provisions of proper means of access to and from the street occurring in Section 342 cannot apply to any encroachments or obstructions coming under Section 341 of the Act and that in any case these words mean simply that every individual owner of premises adjoining the public street or abutting thereon has a right to demand from the General Committee that his means of access to and

CASE.—(*contd.*)

Secs. 292, 341, 342 & 586 *Culverts. Fees for permission and powers of removal.* (contd)

from the street be left free and open to him and that any obstruction thereto be removed. It is submitted that the right of access means nothing more than a right of way as an easement and that the right of proper access must be differentiated from the right to build or erect encroaching structures obstructing a public street or the side drains attached thereto. It is also to be noted that, in erecting building, the owner of the premises is required to shew on the plan his means of access from the street [Rule 30 (2) (c) Schedule XVII.]

It is further contended that both under Sections 292 and 340 of the Act the Municipal Authorities concerned are empowered to consent to encroachments and obstructions referred to therein and that such consent must be under written permission, and that under Section 586 (2) of the Act it is competent of the Corporation to fix a fee therefor and that there is therefore nothing illegal or *ultra vires* in the proposal contained in the resolution of the Corporation, dated the 29th April, 1908.

Counsel will be pleased to advise—

1. Whether Sections 341 and 342 have any application to the case of a culvert over a roadside drain which is used bona fide as a means of access to the premises?

2. Whether the erection of culverts as a means of access as aforesaid is permissible by the Municipal authorities, and if so, whether a written permission or license under Section 292 can be insisted upon therefor?

3. If Counsel be of opinion that a party is entitled to have a culvert as a means of access as a matter of right and without any permission or license as aforesaid, whether or not the Chairman or other Municipal authority should be justified in imposing conditions as to its size, dimensions and the materials of which it should be constructed and restricting its user to certain specified purposes? If so, how can this be done?

CASE.—(*concld.*)

Secs. 292, 341, 342 & 586 *Culverts. Fees for permission and powers of removal.* (contd)

4. Whether culverts or other structures attached to buildings and projecting or encroaching over the side drains attached to public street but not causing any physical obstruction, can come under the term "fixtures" referred to in Section 341 of the Act and be removed thereunder?

5. Whether culverts which are not attached to any building but simply serving as a means of access to a plot of land can lawfully be removed under Sec. 342?

6. Whether or not the latter part of Section 342 (2) should be taken as a restriction on the powers vested in the General Committee under Section 341 of the Act?

7. Whether it is incumbent upon the General Committee to provide means of access in cases coming under Section 341 or the removal of such fixtures and whether the rights of adjoining owners extend to the construction or erection of such structures over the Municipal drains without permission under Section 292?

8. Whether under Sections 292 and 586 of the Act it is competent for the Municipal authorities concerned to fix the scale of and levy fees for written permission sanctioning the erection of culverts to serve as a means of access or allowing the continuance thereof in the case of existing ones?

9. What is the meaning of the word "fixture" occurring in Sections 341 and 342 of the Act?

On what principle is "reasonable compensation" referred to in Sec. 341 (3) to be assessed? Is it on the principle or footing of the Land Acquisition Act less the statutory allowance therein mentioned or on the footing of the value of the structures removed that is to say, reasonable compensation for structural damage only.

Opinion.

Secs. 292, 341, 342 & 586. *Culverts. Fees for permission and powers of removal.* (contd.)

1. I am of opinion that Secs. 341 and 342 of the Calcutta Municipal Act have no application to the case of a culvert over a roadside drain which is used as a means of access to adjoining premises. The owner of premises adjoining a public street is entitled to proper means of access to and from his premises. A masonry culvert over a roadside drain does not appear to be "a fixture attached to a building" within the meaning of Sec. 341, nor would such a culvert be removable under Section 342 unless it amounts to an obstruction of, or an encroachment on, a public street.

2 & 3. The written permission of the Chairman would seem to be necessary before a culvert, being a structure, can be *newly* erected over any Municipal drain under Sec. 292 (1). At the same time, such permission could not legally be arbitrarily or unreasonably withheld in any case where the proposed culvert constitutes a means of access to the premises; when the permission is essential reasonable conditions may be imposed.

4 & 5. In my opinion the answers to both of these questions should be in the negative.

6. Sub-section (2) of Sec. 342 appears to restrict the power conferred by Sec. 341 to remove projecting fixtures; in the sense that the General Committee being bound to provide proper means of access to and from the street if none exist already, where such means of access are in existence they shall not be removed.

7. The answer to this appears from the foregoing answers.

8. It seems to be competent to the Corporation under Sec. 586 to levy a fee for written permission to the erection of a culvert under Section 292, but when a culvert so newly erected affords the only means of access

OPINION.—(*concld.*)

from the street to the adjoining premises it seems to me to be undesirable that any fee should be levied in respect of such permission. Secs. 292, 341, 342 & 586. *Culverts, Fees for permission and powers of removal.* (concld)

9. The word "fixture" not being expressly defined by the Act must be regarded as being used in its natural and ordinary signification, that is, as meaning anything affixed or attached to a building. The word "fixture" is, however, to some extent qualified by the subsequent words: "so as to form part of the building." A porch, or balcony, or verandah would be illustration of the term fixture as used in Section 341 of the Act.

In my opinion the "reasonable compensation" referred to in Section 341 (3), means reasonable remuneration in respect of the structural alteration involved in, or of the direct damage or injury resulting from, the removal of a fixture under the section. For this purpose the rules of assessment of compensation under the Land Acquisition Act on compulsory acquisition of land are not incorporated in the provisions of the Municipal Act, nor are they, in my view, in any way relevant or applicable.

G. H. B. KENRICK,
Advocate-General.

9th July, 1910.

Removal of Platforms at 1, *Jhamapooker Lane—Question of adverse possession—Platforms if Fixtures.*

CASE.

(Submitted by the party.)

The premises No. 1, Jhamapooker Lane belonging to Kumar Norendra Nath Mitter has two masonry parapets. The parapets measure 8 feet by 14 inches and are attached to them in building and between the two there is a distance of 10 feet which is paved with cement. There is Sec. 341. *Platforms at 1, Jhamapooker Lane.*

CASE.—(*contd.*)

Sec. 341. *Platforms at 1, Jhamapuker Lane.* (contd)

no direct evidence as to when the platforms were built but they have been in existence for more than half a century. There was an open drain along the western side of the premises which is claimed by the Kumar as his own private property while the Corporation say that it is a public drain.

Sim's plan which was prepared in or about the year 1850 shews this drain and many of the residents of the locality remember to have seen it. In the conveyance under which Raja Digambar Mitter (the Kumar's Grandfather) purchased that portion of the property through the eastern boundary is stated to be a public drain which existed at the time and which has since then been filled up, the western boundary is given as Jhamapooker Lane.

It is beyond question that the Kumar and his ancestors have been for over fifty years in undisputed possession of the same at any rate over that portion of the strip on which the platforms stand as his durwans and sepoys are accustomed to sit there and have been doing so all along, since their erection without any disturbance from the Corporation (except as hereinafter mentioned). The windows of the rooms on the ground floor open outwards and project over the strip of land covered by the said drain and there is a verandah on the 1st floor overhanging the greater portion of the strip.

On the 10th December, 1888 a notice was served on Babu Mohendra Nath Bose, Executor to the estate of Raja Digambar Mitter deceased under the provisions of Sec. 208 of Act IV (B.C.) of 1876 requiring him to remove the said platforms on the ground that they were encroachments on the public road. As he refused to comply with the notice, another notice dated the 23rd February, 1889 was served on him under the provisions of Section 209 of the said Act again requiring him to remove the said platforms. Certain negotiations then took

CASE.—(*contd.*)

Sec. 341. *Platforms at 1, Jhamapooker Lane.* (contd.)

on between the Corporation and Babu Mohendra Nath Bose for amicable settlement of the dispute and it was eventually agreed between the parties that the dispute would be referred to the arbitration of three Commissioners, Babu Hari Prasanna Sen, Rash Behary Dass and Sreenath Dutt and that the award of the said arbitrators or of the majority shall be binding on the said parties. A copy of the deed of submission is forthcoming but the award cannot be traced if any award was made on which point neither the Kumar nor the Corporation can give any definite information. The arbitrators are all dead and so are the executors and all the employees of the Kumar who were likely to know whether any award was actually made or not. One thing is however clear that no action was taken since then up to the time hereinafter mentioned for the removal of the said platforms.

Early in 1906 the Corporation commenced to put down kerb and channel stones in Jhamapooker Lane and when they attempted to do so on the site of the said drain the Kumar resisted and thereupon certain correspondence passed between the Kumar's Solicitors and the Corporation. It was eventually arranged that the Kumar would not object to the putting down of the kerb and channel stones but without prejudice to his rights as regards the overhanging verandah and the projecting windows. Nothing was said at the time about these platforms.

Thereafter on or about the 2nd July, 1906 notice under Sec. 341 of Act III of 1899 B.C. was served on the Kumar and upon his refusal to comply with the same proceedings under Sec. 450 of the said Act were instituted in the Court of the Municipal Magistrate of Calcutta. After the whole of the evidence for the prosecution had been adduced, the Kumar submitted a case for opinion to Mr. B. C. Mitter and the latter advised that

CASE.—(*concld.*)

Sec. 341. *Platforms at 1, Jhamapuker Lane.* (contd.)

the parapets were not fixtures and therefore could not be dealt with under the provisions of Sec. 450 of the said Act. A copy of the opinion was sent to the Chairman and it was proposed that if he was not prepared to act upon it the Kumar was willing to submit a case to the Advocate-General and that both parties would be bound by it. The Solicitor to the Corporation on behalf of the Chairman assented to the proposal.

Counsel is requested to give opinion on the following points :—

(a) Whether or not the Kumar has acquired a title by prescription in the land upon which the two platforms stand assuming but not admitting that such land did not originally belong to his ancestors?

(b) Whether the said platforms can be 'fixtures' and dealt with under the provisions of Secs. 341 and 342 of the said Act?

(c) And generally as to the right of the Corporation to interfere with them.

OPINION

(a) Adverse possession of land dedicated as highway will give the ownership of the land in 12 or 60 years according as the owner is a private person or the Government. Before the amending Act XI of 1900 adverse possession for a period of 12 years against a Municipal Corporation would have been sufficient and under the last mentioned Act the period is 30 years. If the Kumar had been in adverse possession of the portion of the public street in question for more than 12 years before Act XI of 1900 came into operation (*viz.*, 24th August 1900) that Act would not apply and would not extend the time (See I. L. R. 24 Mad. 635, 650 and 651)

OPINION.—(*concld.*)

Sec. 341. *Platforms at 1, Jhamapuker Lane.* (concld.)

On the facts stated I am of opinion that the Kumar did acquire a title by prescription before the 24th of August 1900. See also I. L. R. 19 Mad. 154 at page 156.

(b) If my previous answer is correct, the platforms cannot be dealt with either under Section 341 or Section 342 of Act III of 1899 B. C. It is more than doubtful as to whether the said platforms are fixtures within the meaning of Sec. 341. *See* generally the article on Fixtures in the Encyclopedia of the Laws of England, Vol. 6, page 103 (2nd edition.)

(c) Assuming the facts stated in the case to be correct, the Corporation has in my opinion no right to interfere with the platforms.

If the land on which the platforms stand originally belonged to the predecessors in title of the Kumar, the result is the same, though there is no question of adverse possession in that case. The Kumar has the title by purchase in that case.

9th April, 1909. S. P. SINHA.

Closure of Roads to traffic for Drainage Works —Liability for compensation to parties suffering damage or loss.

CASE.

Secs 346 & 347. *Closure of roads to traffic. Compensation for damage or loss.*

In connection with the construction of drainage and sewer works relating to the Fringe Area Drainage Scheme, it was found necessary to execute certain drainage works in Gas Street. On 23rd January, 1909 public notice by means of advertisement was given of the closure to traffic of Kumar Dinendra Narain Roy's Street from the junction of Gas Street to the junction of Gurpar

CASE.—(*contd.*)

Secs 346 & 347. *Closure of roads to traffic. Compensation for damage or loss.* (contd)

Road in Ward No. IV of the city. On the 17th May, 1909 similar notice for the closure of Gas Street from Upper Circular Road to Canal West Road was duly given and these roads were accordingly remained closed to traffic. These notices were given apparently under Sec. 346 of Act III B. C. of 1899 of the Calcutta Municipal Act.

Section 345 of the Act refers to the execution of certain works specified therein in streets including the laying of drainage. It enjoins the execution of the work with all convenient speed.

Section 346 makes it discretionary with the Chairman to direct that during the execution of any work referred to in Section 345 aforesaid, such street may be wholly or partially closed to traffic generally or traffic of any specified description.

Section 347 makes it incumbent on the Chairman to make, as far as may be reasonably practicable, adequate provision for the passage or diversion of traffic for access to the premises approached by such street closed as afore said, etc. Under Clause (2) of that section the Chairman shall pay compensation to any person who sustains special damage by reason of the execution of such work

The Calcutta Ice Association has its Factory at 3, Gas Street in which ice is manufactured and then supplied to the various depots and other consumers by means of drays, waggons or vans drawn by bullocks. Such deliveries by such carts or vans are made ordinarily by way of Gas Street through a road leading thereto from the Factory.

It appears however that owing to the closure to traffic of Gas Street and Kumar Dinendra Narain Roy's Street as aforesaid, the Ice Association experienced considerable difficulties in making deliveries to the consumers and the depots of their goods.

CASE.—(*contd.*)

Secs 346 & 347. *Closure of roads to traffic. Compensation for damage or loss.* (contd)

It is contended on behalf of the Calcutta Ice Association that the expenditure incurred by them in order to provide passage for their ice carts is a necessary one and that the same is payable by the Chairman under Clause (2) of Sec. 347 of the Calcutta Municipal Act.

It may be noted here that the difficulties in their ice carts and vans negotiating the steep incline leading to the Bridge at the east of Gas Street are admitted by the Chairman and the Engineers of the Corporation.

But it is contended that the expenditure incurred by the Ice Association in making up and keeping in order a private bustee passage for the more convenient transit of their loaded carts and vans cannot come under clause 2 of Sec. 347 aforesaid. The compensation payable there under is for any special damage sustained by reason not of the blockage or closure to traffic of any public street by the Chairman under Sec. 346 of the Act but by reason of the execution of any work referred to in Sec. 345 of the Act.

It is further contended that even if the expenses incurred by the Ice Association be taken into account in computing the compensation payable under Section 347 (2) it has not been shewn that the same were absolutely necessary for the purpose of securing egress for their carts, regard being had to the passage up the Canal Bridge available for the carts and vans of the Association. It is submitted that the means adopted by the Calcutta Ice Association for removing the difficulties experienced for transit of their goods were not reasonable and proper, and that no previous notice therefore for the making up and repairs to the bustee road was ever given to the Chairman in time. It is submitted that, under the provisions of Sec. 347 (2), only reasonable and natural compensation for damages resulting in the ordinary course of human affairs by reason of the execution of the drainage works

CASE.—(*concld.*)

Secs 346 & 347. *Closure of roads to traffic. Compensation for damage or loss.* (contd.)

can be claimed. In the absence of facts proving that the use by the Ice Association of the private bustee road and the making up and repairs thereto without previous notice to the Municipal Authorities was the only reasonable, necessary, and proper way of obviating the difficulties experienced by the Ice Association and that the other mode of passage of their loaded carts up the Canal Bridge and Belliaghatta Road would have entailed larger expenditure and more considerable difficulties to the Association, it is submitted that the course adopted by the Association cannot be regarded as reasonable and proper. It is contended that the Ice Association should have adopted the course of using the Canal Bridge and that expenditure reasonable incurred in this is the only reasonable compensation payable to the Association and that any way the compensation, if any, payable to them must be computed on this basis.

Counsel will be pleased to advise :—

(a) Whether under the circumstances of the case any compensation is payable to the Ice Association?

(b) Whether the compensation claimed by the Association can be regarded as reasonable and natural regard being had to the circumstances of the case?

(c) If not, the basis on which such compensation is to be calculated?

(d) To advise the Chairman as to the best way of solving the difficulty involved in, and raised by the circumstances of the case?

OPINION.

(a) & (b) I am of opinion on the facts as stated that the Ice Association are not entitled to compensation. The

OPINION.—(*contd.*)

Secs. 346 & 347. *Closure of roads to traffic. Compensation for damage or loss.* (contd.)

Association would be legally entitled to compensation under Sec. 347 (2) of the Calcutta Municipal Act 1899 only in the event of their being able to establish that they had sustained special damage by reason of the execution by the Corporation of any work in any public street. It is obvious that this sub-section contemplates compensation for special damage (*i e.*, any particular damage or loss sustained by a particular individual beyond what is sustained by the general public) directly resulting from the "execution of works in streets" within Sec. 345 (1). Thus special damage resulting from the improper fencing or guarding, or the insufficient lighting or the inadequate shoring up or protection of adjoining buildings, or negligence in filling in the ground or carrying away of rubbish, would be claimable.

Even if the Act [Sec. 347 (2)] could be construed so as to entitle to compensation for special damage sustained by reason of non access to premises owing to the execution of works by the Corporation in a public Street, the facts would not, in my opinion, enable the Association to claim compensation. "Special damage" can only mean some particular loss or injury directly resulting to the Ice Association from the acts or conduct of the Corporation. The Association in the circumstances have not sustained any such damage or loss; but have in fact incurred expense by reason of their acts. In my opinion, there is no statutory or other liability on the Corporation to compensate the Association for or in respect of expenses voluntarily incurred by the Association in making up and repairing the Bustee Road without notice to or the knowledge or assent of the Corporation, and merely for the convenience of the Associaiton.

(c) If the Association had in fact incurred extra expense by reason of the extra cost of cartage or labour

OPINION.—(*concld.*)

Secs 346 & 347. *Closure of roads to traffic. Compensation for damage or loss.* (concld)

due to a longer route or traversing a steep incline in consequence of the closing of the streets by the Corporation, they would at least have had a moral claim against the Corporation though even in such event it is open to doubt whether there would have been any statutory claim against the Corporation.

(d) In my opinion, the Chairman would not in the circumstances be justified in making any payment out of ratepayers' money to the Association, as the facts do not disclose any legal claim against the Corporation within the meaning of Sec. 347 (2) of the Municipal Act, and I should advise the Chairman to repudiate any claim for compensation which may on these facts be put forward on behalf of the Association.

G. H. B. KENRICK,
Advocate-General.

20th January, 1910.

Alignment of existing and Projected Streets—Direct damage if it means damage to land or to building also—Refusal of sanction to build over area falling within prescribed alignment of a projected street.

CASE.

Secs. 350, 356, etc. *Street Alignments.*

Section 350 of Act III B.C. of 1899 the Calcutta Municipal Act empowers the General Committee of the Corporation to define the general line of buildings on each or either side of a public street in existence at the time. Sub-Sec. (2) thereof restricts the definition of such lines so as not to extend further back than the line of the wall of the building abutting on the street at its widest part. The word 'building line' is defined in Sec. 3 (3) of the Act means a line (in the rear of a street alignment) up

CASE.—(*contd.*)

Secs. 350, 356, etc. *Street Alignments.* (contd.)

to which the main wall of a building abutting on a street may lawfully extend. The term 'street-alignment' as defined in Sec. 3 (47) means a line dividing the land comprised in and forming part of a street from the adjoining land. Under Sec. 3 (37) a public street shall be deemed unless the contrary is shewn, to include all land up to the outer wall of premises abutting thereon or to the street alignment if any prescribed therefor. Rule 6 of Schedule XVII of the Act provides for an open space of 4 feet to be left in streets laid out after the commencement of the Act between the street line and the building line thereof.

The word 'abutting' occurring in Sec. 350 of the Act has not been defined in the Act. Reference may be made if necessary, to Sec. 22 of the London Building Act of 1894 (57 and 58 Vict. Ch. cxiii). Sec. 150 of the Public Health Act 1875 (38 and 39 Vict. C. 55) and to the cases "London N. W. Railway *vs* Pancras Vestry 17 L. T. (N. S.) 654; Paddington Vestry *vs*. Brainwell 44 J.P. 815, Lavy *vs* London County Council (1895) 2 Q. B. 577 and London County Council *vs*. Pryor (1896) 1 Q. B. 465 for the proper interpretation of the expression.

Section 351 of the Act prohibits the construction of any building or wall or any portion thereof within the line defined under Sec. 350. Sec. 352 lays down the procedure to set back any such building or wall projecting beyond such a line.

Section 356 of the Act authorises the General Committee of the Corporation to prepare schemes and plans of proposed public streets shewing among other things the street alignment and the building line on each side. Sub-Section (2) of that section regulates the minimum width of such streets, subject however to the proviso thereto, that when the street alignment runs along an existing

CASE.—(*contd.*)

Secs. 350, 356, etc. *Street Alignments.* (contd.)

street and the General Committee consider it impracticable to widen the street to the requisite width, this minimum need not be adhered to. Sub-Section (4) provides for the application of Sec. 352 aforesaid for setting back buildings or walls projecting across the street or the building lines defined in accordance with Sub-Section (1).

Section 357 of the Act provides for the acquisition of lands and buildings standing thereon "required for the purpose of widening, opening, extending or otherwise improving any public street or making a new public street." Sub-Sec. (2) thereto empowers the acquisition of any land outside the proposed street alignment with buildings thereon which the Corporation in the exercise of any of the powers conferred under Sub-Section (1) may consider it expedient to acquire. The proviso to this sub-section authorises the owner of such land to retain it on payment of a sum fixed by the General Committee thereunder.

Section 392 of the Act provides that, if permission to erect a masonry building or to convert huts into masonry buildings be refused on the ground that the site, or any portion thereof, falls within the street alignment of any projected public street and if such site, or portions thereof, be not acquired within one year from such refusal, the Corporation shall pay compensation to the owner thereof.

Questions have arisen as to the various powers conferred under these sections.

(A) It is in the first place contended that in defining the general line of buildings under Sec. 350, the maximum width can only be taken between the walls of buildings abutting on the street and that the wall of a building standing back (on its own land) at some distance from the street cannot be taken into account in fixing such maximum, as is clearly indicated by the words "at its [illegible]part." This contention, it may be noted, is based

CASE.—(*contd.*)

upon the assumption that abutment on a street in respect of a building means that the building must stand actually on the edge of a street.

Secs. 350, 356, etc. *Street Alignments* (contd.)

On the other hand it is contended that under the definition of the term "building line" the main wall of a building is the point of determination of the line, and this view is strengthened by the definition of building line in Sec. 3 (3) of the Act, and that the powers of the General Committee in defining the street alignment and the building lines of proposed street under Sec. 356 as well as under Sec. 350 must be taken to extend up to the main wall of a building even though such building may stand back on its own land from the street, and that it is therefore competent of the General Committee to define a building line under Sec. 350 or 356 so as to include all lands lying between the street line and the main wall of such building so standing away.

(B) A further question as to the powers under Sec. 350 has arisen as to whether the existence of the wall of a building abutting on the street at its widest part is the condition precedent to the exercise of the powers under Sec. 350 and to the procedure to be adopted in such a case. Considerable doubt exists whether or not the existence of such a wall is necessary under Sec. 350 and also whether if such walls stand back away from the actual street, the width between these walls can be taken into consideration in fixing the general line of buildings, and further whether in accordance with the definition of building line in Sec. 3 (3) of the Act the main wall and not the boundary wall should be made the point of determination of the building line.

It is contended on the one hand that Sec. 350 of the Act really empowers the Municipal authority concerned to widen the actual street by defining the building line,

CASE.—*(contd.)*

Secs. 350, 356, etc. *Street Alignments.* (contd)

It is urged that the exercise of this power of gradually widening and making regular an existing street is conditioned by the widest part of the street, and that such widest part is to be determined by taking into consideration that wall abutting on the street at such widest part, and further that the very use of the term 'wall' without any qualification thereto in Sec. 350 means and implies that even a boundary wall must be taken into consideration in defining the building line.

On the other hand it is contended that in accordance with the principles, decided in the English cases referred to above, bearing on the question of abutment of buildings on a street and the use of the term "general line of buildings" in Sec. 350, it is competent of the General Committee under Sec. 350 of the Act to include within the building line all lands up to the main wall of a building; and that a mere boundary wall not being the main wall under Sec. 3 (3) can be neglected in computing the maximum width. It is urged that the terms "at its widest part" occurring in Sec. 350 must not be taken therefore in a literal sense so as to restrict the powers under the section to the actual widest part of the street. It is suggested that though in existing streets the building line and the street alignment practically coalesce, yet there is nothing to prevent the Municipal Authority in defining a building line to take the width of the street to extend up to the main wall of a building abutting on the street, at its widest part:

(C) Another question has arisen as to the compensation payable under Sec. 352 of the Act as to whether such compensation is payable on the basis of direct damage to the building or whether the compensation must, in accordance with the explanation to that section, be based on the market value of the land only thus added to the street under Sub-Section (6).

CASE.—(*contd.*)

Secs. 350, 356, etc. *Street Alignments.* (contd)

It is contended on the one hand that, by the explanation to the section, *only direct damage to the land* can be paid for and that as the section contemplates the gradual widening of an existing street by the addition of lands falling within the street by means of the building line being defined under Section 350 of the Act, no other damages can be taken into consideration.

It is, on the other hand, contended that the section contemplates the payment of direct damages both to land as well as to the wall or building thus set back, if any, and that the explanation merely lays down the procedure for computing the direct damage to land only and does not exclude the consideration of direct damage to the building or wall, if any, and that the clause in Sub-Section (2) as to the payment of full compensation to the owner of the building or wall for any direct damage sustained by him by the setting back of his building or wall is clearly indicative of the liability to pay compensation for the building or wall thus set back, such compensation being computed in the ordinary way and the compensation in respect of the land being determined as per explanation to that section.

(D) Another question has arisen as to whether it is competent of the General Committee to lay out a projected public street under Sec. 356 so as to widen an existing public street, and whether sanction may be refused under the law to the erection of any building or wall projecting across the alignment of such projected street so far as such alignment concerns.

On the one hand, it is contended that ,inasmuch as Secs. 350 and 351 of the Act have reference only to existing streets, they do not apply to a case under Sec. 356, that the powers conferred under Secs. 350 and 351 therefore cannot be exercised in connection with a projected public street laid out under Sec. 356, and that in

CASE.—(*contd.*)

Secs. 350, 356, etc. *Street Alignments.* (contd.)

any case they cannot apply to the widening of an existing public street, which can come under Sec. 350 only of the Act. It is urged that the widening of any public street by the indirect process of defining the building line thereof under Sec. 350 is meant to be applicable to existing streets only, and that all exercise of powers under this gradual process is contingent, as Sec. 352 illustrates, on buildings or walls across such a line being taken down or burnt down or having fallen down. It is suggested that inasmuch as the power to refuse sanction to a masonry building is vested in the Municipal Authorities under Sec. 351 only, such powers are not clearly exercisable in a case coming under Section 356. In this connection Sec. 392 should also be noted. It is further suggested that in any case the wording of Sec. 392 shews that the refusal to sanction in a case coming under that section is valid only with reference to the "street alignment" as against the "building line" of the projected street and that the fact that in cases of existing streets there can of necessity be only one line viz., the street alignment, militates against the suggestion that an existing street can be widened under Section 356. It is contended that inasmuch as under Sec. 392 a refusal to sanction can be legally made only in case of structures encroaching on the street alignment and that as such street alignment being defined under Sec. 350 cannot extend in any case beyond the wall or building standing on the edge of the existing street, the projected street must be taken to be limited to the existing street at its widest part.

On the other hand it is submitted that inasmuch as the General Committee are competent under Sec. 356 to define the street alignment and the building line of any projected street including an existing street under certain circumstances the powers to be exercisible under

CASE.—(*contd.*)

Secs. 350 and 351 may be taken by implication to be applicable in a case coming under Sec. 356 so far as such powers may be consistent therewith and necessary thereto. It is suggested that Sec. 356 must be taken to confer all necessary powers to restrict the erection of buildings or walls encroaching upon any portion of the land required to be left open, and that the necessary limitation to the erection of such buildings, etc., is implied in the laying down of the building lines of a projected street under the section. It is submitted that under Sec. 392 the General Committee must be taken to have by implication (as the result of a fair interpretation thereof) power to refuse sanction of all projecting buildings and structures. It is also submitted that as Rule 6 of Schedule XVII referred to applies to all projected streets, it must be taken to include existing ones intended to be widened and that the erection of buildings or walls over and across the building line of the projected street can be restrained thereunder coupled with Secs. 449 and 599. It is contended further that under the proviso to Sub-Section 2 of Section 356 the alignment of a projected public street need not run along but may run beyond the sides of the existing street in effect widening the existing street, and that therefore in the laying down of the street alignment and building line of an existing street so as to widen the same, the General Committee must be taken to lay down a projected public street within the meaning of the Act, it being discretionary with the Municipal Authority to confine or limit the width of such a projected street to the width of the existing street in cases where further widening of the same is impracticable, and that Rule 6, Schedule XVII must be taken to apply to such a case. It is contended further that the power to refuse sanction is merely ancillary to the powers and duties of the Municipal Authorities as to projected public streets and

Secs. 350, 356, etc. *Street Alignments.* (contd.)

CASE.—(*contd.*)

Secs. 350, 356, etc. *Street Alignments.* (contd.)

necessary to the proper exercise of such powers, and as such must be taken to go along with such powers. It is suggested that under Section 373 of the Act the refusal to sanction any such buildings or walls on the ground that such building or wall projects over and interferes with the street alignment of the projected street may be lawfully made, the objection being one which can be lawfully maintained in accordance with the true import of Sec. 356, coupled with Sec. 392, the more so because any such erection or re-erection will defeat the very object of the Legislature as to the street and building lines laid down under that section.

(E) A further question has been raised as to whether the powers of the Corporation in cases of projected streets under Section 356 extend so as to enable the acquisition under Section 357 of surplus lands beyond the building line thereof or whether in such cases the powers exercisible must be taken to be limited to the prescribed alignment.

On the one hand it is contended that Sec. 357 is an enabling section for acquisition only, and that the acquisition must be limited to a scheme prepared under Sec. 356. It is urged further that the power to determine what land may be required for the purposes specified in Sec. 357 must be read in the light of the principle laid down in the English cases, Grand *vs.* Commissioners of the Sewer of London 28 Ch. D. 486, 54 L. J. Ch. D. 698 and Teuliere *vs.* St. Mary Abbot's Vestry, Kensington 30 Ch. D. 642, 55 L. J. Ch. 28, and that the Corporation cannot acquire any land beyond the building line as the same is not strictly necessary for the widening of such street.

On the other hand it is contended that Sub-Sec. 2 to Sec. 357 authorises the acquisition of all lands beyond and

CASE.—(*contd.*)

Secs. 350, 356, etc. *Street Alignments.* (contd.)

outside of the street line without any determination of limit, and that the only limitation thereto is that the Corporation must decide as to the expediency of such acquisition and that the sanction of the Local Government must be obtained thereto. It is contended the powers under the sub-section are more extensive than those under the provision of the English Law, [for example Sec. 80 of the Metropolis Paving Act (57 Geo. III Ch. 29)] that under Sub-Sec. (2) of Sec. 357 the provision as to sanction of the Local Government is a safeguard that the extended powers are not exercised to the detriment of the neighbouring owners, and that once the scheme has received the sanction of the Local Government the determination as to what and how much of land is "required" for the purpose of widening an existing street may not be questioned.

Learned Counsel will be pleased to advise . —

I (a) Whether in laying down the general line of building under Sec. 350 of Act III B. C. of 1899 such line must be limited to the actual street at its widest part or whether it is competent of the General Committee to lay down such a line with reference to the main wall of a building standing back from the actual street?

(b) What procedure is to be followed where there are no walls at the widest part of the actual street, or at its actual edge?

(c) Whether the term "wall" in Sec. 350 means any wall or the main wall, and whether a boundary wall which is not the main wall of a building can be neglected in laying down the line.

(d) Whether the word "abut" in Sec. 350 of the Act can be taken in an intended sense on the lines of the English decisions bearing on this point.

CASE.—(*concld.*)

Secs. 350, 356, etc. *Street Alignments.* (contd)

II. Whether in computing direct damage suffered by the owner of a building or wall set back under Section 352 of the Act only the direct damage to the land must be computed or whether such "direct damage" may be both to the land and to the building?

III. Whether a projected street may be prescribed under Sec. 356 of the Act for widening wholly or in part any existing street or in other words whether or not a mere widening of an existing public street wholly or partly could be treated as a projected public street under Sec. 356 having regard to Cl. 4 thereof?

IV. Whether in cases of such projected streets under Sec. 356 of the Act it is competent of the Municipal authorities concerned to refuse sanction to any building or wall sought to be erected or re-erected on or over any portion of the alignment prescribed under Sec. 356?

V. Whether in the case of a public street projected under Sec. 356 of the Act it is competent of the Corporation to acquire under Sec. 357 of the Act any land beyond the alignment thereof?

OPINION.

I. (a) I am of opinion that in laying down the general line of buildings under Sec. 350 of the Calcutta Municipal Act (III of 1899), such line must be limited to the actual street at its widest part.

This appears to be the effect of Sec. 350 (2) of the Act, which enacts that such line shall not be defined so as to extend further back than the line of wall abutting on the street at its widest part.

(b) When there are no walls abutting on the street the general line of buildings should be limited to the actual street at its widest part, keeping in mind the definition of public street given in Sec. 3 (37).

OPINION.—(*contd.*)

Secs. 350, 356, etc. *Street Alignments* (contd.)

(c) There being no definition of the word "wall" in the Act it must be construed in its ordinary and not in a restricted signification. It follows, therefore, that the term "wall" as used in Section 350 must be taken to comprise any wall in the ordinary sense, whether a boundary wall or the main wall of a building.

(d) The decisions of the English Courts on questions of Local Government Law are of no authoritative value in the Indian Courts unless the wording of the particular section of the English Statute to which they relate is substantially the same as that of the section of the Calcutta Municipal Act which is sought to be elucidated by such decisions. The cases cited in the instructions do not appear to throw any light upon the questions now under consideration.

II. In the computation of damage suffered by the owner of a building or wall set back under Sec. 352, for the purposes of computation the words "direct damage" in that section must, in my opinion, be taken to include damage to the wall or building, if any has been sustained, as well as damage to the land. The explanation at the end of Sec. 352 precisely defines the meaning of the expression "direct damage" as used in Sec. 352 (2) with reference to land. On the other hand there is no explanation of the words "direct damage" with reference to buildings, but in this context the words used in their ordinary sense are so obvious in their meaning as to require no definition or explanation.

III. I am of opinion that the mere widening of an existing public street, whether in whole or in part, would not justify the street being regarded as a projected public street within the meaning of Sec. 356.

IV. In the case of a projected street under Sec. 356, it would apparently be competent to the Municipal Authority, having regard to the powers conferred by Secs. 356,

OPINION.—(*concld.*)

Secs 350, 356, *etc.* *Street Alignments.* (concld.)

392, 449 and 559 of the Act, to refuse sanction to any building or wall being erected or re-erected on or over any portion of the alignment prescribed under Sec. 356, such refusal, however, being subject to the payment of reasonable compensation to the owner of the site under Sec. 392. The power to veto the erection of buildings over the street alignment would seem to be incidental to the power to project and open new public streets, and without the former the latter power might in effect be defeated.

V. I am of opinion that in the case of a projected public street it is competent of the Corporation under Sec 357 (1) to acquire any land beyond the alignment thereof provided that such land is *bona fide* required for the purpose of making a new public street. Moreover under Sec. 357 (2) the Corporation with the sanction of the Local Government has power to acquire any land outside the street alignment which the Corporation may in the exercise of their powers under Sec. 357 (1) consider it expedient to acquire. Independently, therefore, of their power under the Land Acquisition Act, the Corporation for the purpose of making a new public street has (under Sec. 357 (1) to (6) of the Calcutta Municipal Act) full power to acquire and dispose of surplus land and buildings.

G. H. B. KENRICK.
Advocate-General.

26th May, 1910.

Scope and Effect of Clauses (1) *and* (2) *of Sec.* 391 *regarding Additions and Alterations to Buildings—Power of General Committee to sanction even though they may not conform to Rules—Meaning and extent of terms "Additions," "Alterations" and "Necessary Repairs"*

CASE.

Sec. 391 *Buildings. Additions & Alterations.* (contd.)

Section 391 of the Calcutta Municipal Act (III B. C. of 1899) runs as follows :—

* * * *

The provisions of the Act relating to the erection of buildings are contained in Secs. 370—383 so far as masonry buildings are concerned and in Secs. 384—390 concerning huts. Further, Schedule XVII contains the rules relating to such erection.

The word "erect" has not been defined in the Act. The word "re-erect" occurring in the said sections and the schedule has been defined in Sec. 3 (39). The expression "cubical extent" is defined in the Act, Sec. 3 (11).

The word "building" has not been defined in the Act but it is submitted that it includes masonry buildings as well as huts *vide* Sec. 3 (22) and (25). There is also no definition as to "necessary repairs," "alterations" and "additions" in connection with buildings.

Rules 50 to 58 of Schedule XVII are the only rules in this connection and the heading of this part (Part IX, Application of Rules to Alteration of and Addition to Buildings) and the reference to Rules 30 to 36 or 47 to 49 in Rule 52 should be noted.

Sections 207 to 210 of the London Building Act of 1894 (57 and 58 Vict. Chapter CCXIII) are as follows :—

"207.—It shall not be lawful (unless with the consent of the Council) to make any alteration of any building in such a manner that when so altered it will by reason

CASE.—(*contd.*)

Sec 391 *Buildings. Additions & Alterations.* (contd.)

of such alteration not be in conformity with the provisions of this Act applicable to new buildings.

"208.—Unless in any case the Council otherwise allows where a party wall or external wall not in conformity with this Act has been taken down, burnt or destroyed to the extent of one-half thereof (measured in superficial feet) every remaining portion of the old wall not in conformity with this Act shall either be made to conform therewith or be taken down before the rebuilding thereof.

"209.—Every addition to or alteration of a building and any other work made or done for any purpose in, to or upon a building (except that of necessary repair not affecting the construction of any external or party wall) shall so far as regards such addition or alteration or other work be subject to the provisions of this Act and of bye-laws thereunder relating to new buildings.

"210.—A building, structure, or work erected or constructed before the commencement of this Act to which no objection could have been taken under any law then in force shall (subject to the provisions of this Act as to new buildings or the alteration of buildings) be deemed to be erected or constructed in compliance with the provisions of this Act."

Question has arisen as to the proper interpretation and scope of Sec. 391.

On the one hand, it is contended that clause 2 of Section 391 must be taken subject to the clause 1 thereto, and that the General Committee have power to consent to any addition to or alteration of buildings provided such alterations or additions do not amount to re-erections as defined in the Act even if such alterations or additions be not in conformity with the building rules so far as they are applicable to such additions or alterations. Thus it is

CASE.—(*concld.*)

Sec. 391. *Buildings. Additions & alterations.* (contd.)

argued that if an owner pulls down a portion of his building of, for example, thirty feet in height fronting a narrow lane of 10 feet in width, he would be entitled to rebuild it provided less than one-half of the cubical extent of the building is affected by the operation. It is contended that, in such a case, Clause 1 of Sec. 391 applies and that the General Committee have power to consent to such alteration and relax the building rules affected. It is argued that Clause 2 of the section prohibiting every alteration or addition not in accordance with the rules, orders, etc., merely lays down the general law and that by virtue of Clause 1 it is competent of the General Committee to consent to such alterations. If, in the exercise of their discretion, they think it fit so to do, it is contended that the case given does not come within the definition of erection or re-erection but of reconstruction of less than half the cubical extent and by the very definnition of re-erection taken with the Sections of the Act and the Rules and the Schedules relating thereto, the building rules should not be held to apply to the case and that there can be no sense in empowering the General Committee under Sec. 391 (1), if the ordinary rules affecting erections be taken to apply to the case of such alterations and additions.

In other words, it is contended that inasmuch as such additions and alterations do not affect more than half the cubical extent of the building none of the building rules applicable to the case of erection or re-erection of buildings would apply, because the works proposed to be done cannot be deemed in any sense to come within the meaning of *erection or re-erection* under the provisions of this Act.

It is further contended that the General Committee by virtue of Clause 1, Sec. 391 are competent to allow additions and alterations to be made even when such ad-

CASE.—(*contd.*)

Sec. 391. *Buildings. Additions & Alterations.* (contd.)

ditions and alterations violate or are not in conformity with the building rules, orders and the other provisions contained in this Chapter notwithstanding Clause 2 of Sec. 391.

On the other hand it is contended that the powers of the General Committee regarding additions and alterations do not affect the provisions of the Act relating to re-erections. It is urged that Clause 2 of Sec. 391 governs the case of all additions and alterations to a building and that if such additions and alterations after pulling down the old structure do not affect half the cubical extent of the whole building, then, by virtue of this clause, the building rules will apply only to the portion re-constructed and not to the other portions of the whole building, and that Rule 50 of Schedule XVII, for example, regulating the application of Rule 2 relating to the heights of old buildings with reference to streets alongside, clearly bears out this interpretation as to the applicability of the building rules to all additions and alterations irrespective of the cubical extent of the whole building. It is contended that in cases where such addition or alteration exceeds one-half the cubical extent, then the case ceases to come under the purview of Section 391 and the building rules will apply equally to the portions not so reconstructed or altered as also to the portions actually altered. It is urged that under Clause 1 the General Committee have no power to relax any of the rules regarding additions and alterations to buildings which amount to re-erections, except as is expressly provided in Rule 23 of Schedule XVII and that Clause 1 of Sec. 391 only empowers the General Committee to consent to such additions and alterations as do not in themselves violate the building rules, but which, without amounting to re-erection, yet make the whole building to be not in conformity with the same. Thus to take a

CASE.—(*contd.*)

Sec 391. *Buildings. Additions & Alterations.* (contd.)

concrete illustration, if in a building existing before the commencement of the Act and occupying more than $\frac{2}{3}$rds of the total area of the site, a portion, say for example, abutting on the interior courtyard, be pulled down and re-constructed, the said additions not in themselves violating any of the building rules but making the building so altered as to be not in conformity with Rule 17 of Schedule XVII, the General Committee would be competent to consent to such alteration.

It is contended that Sec. 391, Clause 1 governs only cases of additions and alterations which themselves being less than half the cubical extent and in accordance with the provisions of the Act therefor make the whole building to be in violation thereof and that Clause 2 governs cases of all additions and alterations *per se*, while the Rules re re-erection must be taken to apply to cases where more than half the cubical extent is affected. It is submitted that this interpretation gives full effect to both the clauses of Sec. 391 as well as to the rules relating to re-erections as defined in the Act; whereas in the other, one of the clauses must control and modify the effect of the other.

Counsel will be pleased to advise on the following points :—

(1) Whether an owner of a building, after demolishing less than half of its cubical extent, can re-build the portion so demolished in violation of the building rules and orders relating to the erection of buildings, provided that the external dimensions remain the same.

(2) Whether Sec. 391 of Act III B. C. of 1899 vests the General Committee with powers to consent to any additions and alterations, or only to those additions and alterations which are themselves not objectionable and do not come under the [illegible] of re-erection but

CASE.—(*concld.*)

Sec 391. *Buildings. Additions & Alterations.* (contd.)

which go to make the whole building thus added to or altered, to be not in conformity with the provisions of the Act and Schedule XVII relating thereto?

(3) Whether additions and alterations which are themselves in violation of the provisions of the Act and Schedule XVII can be sanctioned and consented to by the General Committee under Sec. 391 or whether every such addition and alteration must under Clause 2 of Sec. 391 conform to the provisions of the law referred to therein?

(4) Whether the application of such provision of the law and Schedule XVII to such additions and alterations is affected by the cubical extent of the reconstruction made?

(5) Whether, when more than half of the cubical extent of a building has been demolished and is to be re-erected, the building rules will apply to the whole structure including the portion which remains unaltered. And if so, whether the Magistrate can order the demolition under Section 449 of this portion, which though remaining unaltered violates the building rules. If not, what action can be taken in respect of it?

(6) What are the meanings of the terms "additions" "alterations" and "necessary repairs" as used in the section?

Copies of other Counsels' opinions (*i.e.*, the opinions of Messrs. Stokoe, Sinha and Woodroffe given on pages 111 to 115 of the 1st volume of Legal Opinions and Rulings) were submitted for reference with the case.

OPINION.

(1) I am of opinion that an owner after demolishing less then one-half the cubical extent of a building cannot legally re-build it in violation of the ordinary building

OPINION.—(*contd.*)

Sec 391. *Buildings. Additions & Alterations.* (contd.)

rules, even though its external dimension remain the same, for Sec. 391 (2) of the Act requires that every alteration of, addition to, or other work upon a building (other than necessary repairs not affecting its dimensions) shall be subject to the building rules imposed by the Act.

2 & 3. On the construction which I place upon Sec. 391 (1), the General Committee are empowered to consent to any alteration of or addition to any building which building but for such consent would, after such alteration or addition, involve an infringement of the Act or of any orders, rules or bye-laws made thereunder. In my opinion, Section 391 makes the consent of the General Committee necessary only in the case of such additions, alterations, or other work as would have the effect of making the building when the alteration, addition, or work is completed out of conformity with the provisions of the Act. With the exception, however, of the case above indicated, all additions to, alterations of and other work upon a building are in general subject to the ordinary statutory building rules.

4 & 5. When more than one-half of the cubical extent of a building has been demolished and is to be reconstructed, in my view, the statutory building rules will apply to the whole structure including the unaltered portion, for in this event the reconstruction of the building amounts to a re-erection within the definition contained in Sec. 3 (39), and it follows that the rules regulating the re-erection of buildings are applicable to the whole structure. If such rules be infringed it would seem advisable that the General Committee should have power to apply to a Magistrate, and for the Magistrate to be able to make an order for the demolition or alteration of the part of the building which remains unaltered and is not in conformity with the building regulations.

OPINION.—(*contd.*)

Sec. 391. *Buildings. Additions & Alterations.* (contd.)

But whether such an order could properly be made under Sec. 449, as at present drafted, is open to some doubt. Under that section the Magistrate has power to make an order for demolition or alteration of "so much of the work as has been unlawfully executed." Inasmuch as the building when reconstructed does not comply with the building rules, it might be urged that it has not, as a whole, been lawfully executed and that consequently an order could be made as to so much of the same as is in non-compliance with the rules, *i e*, the unaltered part, but, on the whole, I am of opinion, that this would be somewhat straining the construction of the section which must be construed strictly. It might, nevertheless, be deemed expedient for the Corporation by a test case to obtain an authoritative decision from the High Court on this point by reason of its importance, so as either to establish a rule which can be generally acted upon, or, should the decision be adverse, to indicate the need of fruther enabling legislation.

6. The words "additions," "alterations" and "necessary repairs" must be construed in accordance with their ordinary grammatical signification.

G. H. B. KENRICK,
Advocate-General.

13*th December*, 1909.

Further reference to Counsel.

The above case and opinion were subsequently referred to Messrs. C. P. Hill and B. Chakravarti with the following further questions :—

(a) Whether the owner of a building after demolishing less than half of its cubical extent is entitled, without the sanction of the General Committee to restore the portion if he does not alter the position or dimensions and therefore does not for the first time infringe any other Rule,

Opinion.—(*concld.*)

(b) If it is not a case of re-erection whether the building regulations would apply, if the dimensions and position of the building remain unchanged. **Sec. 391. *Buildings. Additions & Alterations.* (concld.)**

(c) Whether Clause 2 of Sec. 391 is governed by Clause 1 of that Section.

Opinion

Before we answer the queries put us. we desire to point out that it seems to us clear that Clause 1 of Sec. 391 confers upon the General Committee full and unrestricted discretion to consent to any alteration of, or addition to any building in violation of the provisions of chapter XXIV or Schedule XVII, and that clause 2 is controlled by Clause 1 of Sec. 391. We are of opinion that any other construction of Sec. 391 would make the provisions of clause 1 of that section meaningless.

We now proceed to answer the queries categorically.

(1) Our answer is in the affirmative if the previous consent of the General Committee has been obtained, and in the negative if no such consent has been obtained.

(2) We think the section vests the General Committee with power to consent to any additions or alterations.

(3) Our answer is "yes" to the first part of the query and "no" to the second part.

(4) We do not think so.

(5) Not to the whole but only to the portion re-erected. The Magistrate cannot consequently make any such order. The Act does not provide any remedy.

(6) These words bear the ordinary meanings.

(a) He is not entitled.

(b) We think so.

(c) Yes, we think so.

16th February, 1911. C. P. Hill.
[illegible]

Bustee Improvement—Compensation for huts to be removed from land required for widening public streets in bustee, if a legal necessity—Corporation Improvements, if they must be shown in standard plan—Powers of General Committee to defer improvements against Inspecting Officers' certificate.

CASE

Secs. 406-409. Bustee Improvement. Compensation for the Removal of Huts.

Sections 406 to 409 of Act III B.C. of 1899 provide for the preparation of the standard plan for improvement of unhealthy bustees by the General Committee of the Corporation. Sec. 406 provides among other things for a report by two Officers shewing the improvements which must be forthwith taken in hand as well as those which should be deferred.

The former class of improvements is contained in Schedule A attached to that report and Sub-Sec. 8 provides that the Schedule among other things must clearly indicate (a) the huts which should be wholly or partly removed (b) the streets, passages and drains which should be constructed (c) other improvements which the reporting officers consider to be required to remove or abate the unhealthy condition of the bustee. In cases where there is an existing public street or a filled-up sewered ditch vested in the Corporation and the same is required to be widened for the improvement of the bustee, the present practice for the Corporation is to acquire the land required for such widening and to construct the road, the owner of the bustee being required to clear such lands of such huts that may be standing thereon without payment of any compensation for such huts.

Question has arisen as to whether in such cases the Corporation is bound to pay compensation to the owners of the hut wholly or partially removed for the purpose of widening an existing public street or sewered ditch.

CASE.—(*contd.*)

Secs. 406-409. *Bustee Improvement. Compensation for the Removal of Huts.* (contd.)

On the one hand it is argued that under Sec. 406 (3) huts to be wholly or partially removed for the purposes of any improvement connected with the bustee should be included in Schedule A, and the person liable for the carrying out of the items of improvement can be called upon to remove such portions of the huts without payment of compensation, that the construction of streets, passages etc., is evidently regarded as a distinct improvement apart from and irrespective of, huts or other structures that have to be removed for the ultimate purpose of the construction of such streets and passages, and that this is evidenced by Sub-Sec. (3) of Sec. 406. Sec. 411 may be noticed, but this relates to land which is not bustee land. It may be mentioned here that the tenants or the hut-owners in a bustee are generally tenants at will.

It is further contended that the powers of the Corporation under Sec. 406 etc., are not analogous to the powers of acquisition contained in the other sections of the Act and that for example, it would be impracticable to apply to an acquisition under Sec. 406 etc the powers conferred under 357 (2) so as to enable the acquisition of surplus land beyond the alignment of the bustee street proper, and it would seem therefore that the Corporation is not bound by the analogy of acquisition of land under Sec. 357 and other sections of the Act, to pay compensation for the structures standing on such land. It may be noted that the Corporation is empowered to require any hut in the bustee to be wholly or partially removed for the general improvement of the bustee at the owner's expense and that the fact that the removal of certain huts may facilitate the widening of a public road is not material to the question at issue, and gives no claim to compensation.

This contention is borne out by the fact that of the improvements mentioned in Sec. 406, only that referred

CASE.—(*contd.*)

Secs. 406-409. *Bustee Improvement. Compensation for the Removal of Huts.* (contd.)

to in Sub-Sec. 3 (e) is an improvement to be effected by the Corporation under Sec. 411, and the other improvements there mentioned must be construed as devolving upon the owner, or occupier, as the case may be.

On the other hand, it is maintained that the powers of acquisition of land for widening or otherwise improving public streets are conferred under Secs. 357 and 556 of the Act and that in the exercise of such powers, compensation is paid for buildings including huts standing on such land when so acquired. It is maintained that the huts wholly and partly removed under Sec. 406, clause 3 must mean huts removed wholly or partially *bona fide* for the purpose of the general improvement of the bustee and not in order to facilitate the construction of a street by the Corporation at a less expense, and that it is not competent for the General Committee to require the removal of huts for the purpose of widening and improving an existing public street without payment of compensation.

The point will be clear on a reference to the standard plan relating to 22/7, 22/8, Machua Bazar Street, etc., together with the copy of Schedule A attached thereto.

The road C C is to be constructed or rather widened to 20 ft. by the Corporation as it falls along an existing 8 feet road. This would involve the removal of portions of huts Nos. 27, 35, 36, 37, 39, 40 and 44 of the standard plan. These huts stand on the bustee lands and in the notice to the owner of the bustee the partial removal of these huts is shewn among the requisitions.

Counsel will be pleased to advise—

1. Whether the General Committee is competent to call upon owner of the bustee or of the hut to remove the [illegible] wholly or partially without paying any compensation [illegible] such huts fall on land which is to be

CASE.—(*concld.*)

made part of a street by the Corporation at its own expense or is the General Committee bound to pay compensation for such removal of huts?

Secs. 406-409. *Bustee Improvement. Compensation for the Removal of Huts.* (contd.)

2. Whether any work of improvement to be done by the Corporation at its expense need be shewn on the standard plan and referred to in Schedule A *e g.*, the construction of a street?

3. Whether the General Committee can modify or alter the certificate of the Medical Officer and the Engineer as to the urgent or deferred improvements. In other words, has the General Committee power to take out any item of work from Schedule A, and direct the same to be treated as a deferred improvement?

OPINION :

1. The General Committee is not bound to pay compensation for such removal.

The Corporation are given certain powers for the gradual improvement of bustees and certain further powers, in cases where bustees are in such an insanitary condition as to require speedy action. In the former case, there is no power given to the Corporation to require existing huts to be taken down, except on payment of compensation. If they do not desire to pay such compensation they can compel the bustee-owner to carry out the improvements shewn in the standard plan prepared under Sec. 400 only "so far as may be practicable having regard to the existing arrangement of the huts" [Sec. 405 (a)]. In the latter case however *viz.*, when action is taken under Sec. 406, the General Committee may require existing huts to be wholly or partially removed, if shewn in Schedule A, and they are not bound to pay any

OPINION.—(*concld.*)

Secs. 406-409. *Bustee Improvement. Compensation for the Removal of Huts.* (concld.)

compensation for such removal. They may do so in which case they may recover the amount paid from the owner of the land [Sec. 409, Cl. (2)].

Now the removal of such huts may be necessary for the widening or construction of a street which may be public or private but that will not make any difference as to the right of the General Committee to require such removal without payment of compensation. The widest latitude is given to the Corporation to decide whether compensation should be given to the hut-owner or not and as the money, if paid, can be recovered from the owner of the land, and does not come out of the Corporation funds, the General Committee will have no temptation to decide otherwise than fairly and equitably according to the circumstances of each case.

2. I think that it should be shewn on the standard plan and referred to in the Schedule A. The General Committee has power to require the owners "to carry out all or any of the improvements indicated in Schedule A or any portion of such improvement" and the notice under Sec. 408 should specify which of the improvements or which portion thereof should be carried out by the person on whom the notice is served.

3. The General Committee has the power to do so (Sec. 407).

19th March, 1911. S. P. SINHA.

Bustee Improvement—Notice received under Sec 419 in respect of portion—Notice under Sec 408 thereafter to carry out all the improvements, if legal Procedure to be adopted

CASE

Secs. 408, & 419. *Bustee Improvement. Necessity of fresh Notice under Sec. 408, when original Notice included area notified under Sec. 419.*

No formal case was submitted, the opinion was obtained in conference. The facts of the case were as follows :—

A notice under Sec. 407 was served upon the owners of the bustee at 24, Machua Bazar Street on the 26th November, 1909. The owners served the Chairman with a notice under Sec. 419 of the Act, on the 10th December, 1909, with regard to a portion of the above premises over which the proposed road B B passed. After the expiry of the statutory time of 6 months a notice under Sec. 408 was served upon them on the 18th June, 1910, to carry out all the improvements. The owners removed the huts only from that portion of the bustee through which the proposed road B B would run and all the other requisitions of the notice under Section 408 were not complied with.

A case under Sec. 574 was instituted against the owners in the Court of the Municipal Magistrate and they were acquitted by the Magistrate. An appeal was made in the High Court against the order of the Municipal Magistrate and the High Court held that the construction of the proposed bustee passage B B could not be enforced.

Then the question arose as to whether a fresh notice under Sec. 408 should be given calling upon the parties to carry out the required improvements excepting the making of the proposed bustee road or whether fresh proceedings for the preparation of another standard plan in respect of this part of the bustee should be taken in hand.

OPINION.—(*concld.*)

Secs. 408, & 419. *Bustee Improvement.* (concld.)

Fresh notice should be given for the other improvements and the portion with reference to which notice under Sec. 419 was given should be shown in the standard plan as not being bustee land.

3*rd April*, 1912. S. P. SINHA.

Private Streets in Bustees under Improvement, Construction and Improvement of—Notice under Sec. 419, Effect of.

CASE.

Secs 419 & 361. *Private Streets in Bustees.*

With reference to Bustee Improvements under Chapter XXVI of the Calcutta Municipal Act questions arise as to the action which should be taken when parties attempt to evade the obligations imposed on them under Section 407 by serving notice under Sec. 419 and by removing the huts merely from the area prescribed as a street in the standard plan. The provisions for enforcement of Bustee Improvements are laid down in Secs. 405, 408, 409 and 412. Secs. 597, 598 and 599 may also be referred to in this connection.

Owing to the decision of the High Court in the case of Abinash Chunder Ganguly *vs.* Corporation (*vide* pp. 12-13, 2nd Vol. of Legal Opinions and Rulings) difficulties have arisen so far as the making of private streets in bustees is concerned.

It is submitted that the decision applies so far as the enforcement of a notice under Sec. 408 is concerned, but does not affect the rights of the Municipal Authorities under any other section of the Act, *e.g.*, Section 361

CASE.—(*contd.*)

to call upon the parties to level, pave, metal, flag, channel. etc. any private street, including land shewn in any standard plan for a bustee as a street.

Secs. 419 & 361. *Private Streets in Bustees.* (contd.)

It is to be noted that the provisions of Sec. 419 are very peculiar. A person can take the whole or any part of bustee land out of the category of bustee land.

Sections 3 (5), (6) and 4 define what is a bustee or bustee land and the decision of the General Committee is final thereon and it is to be noted that the preparation and approval of standard plans under Secs. 406 and 407 are also the province of the General Committee, and it is also in the discretion of the General Committee under Sec. 419 (4) proviso to direct that the land shewn as a street or part of a street in any standard plan should cease to be such street, but in the absence of such directions the same shall continue to be a private street and be subject to the provisions of Sec. 416 (2), that is to say, that such street should be kept open to the use of the Municipal Authorities for scavenging and other purposes as therein mentioned. The construction of private streets in bustees is one of the most important and beneficial improvements for purposes not only of the convenience of the tenants but on sanitary grounds as well. It relieves congestion, allows light and air and otherwise serves to remove or abate the unhealthy condition of the bustee. It should be noted that Sec. 361 is not referred to in the High Court decision nor was the same considered by the learned Judges in disposing of the case before them.

It is also to be noted that Sec. 361 occurs in the Act in connection with the making of private streets as laid down under Sec. 358, and private street is defined in Sec. 3 (35) and it might be contended that Sec. 361 cannot be applied for the purposes of constructing private

CASE.—(*concld.*)

Secs. 419 & 361. *Private Streets in Bustees.* (contd.)

streets by way of bustee improvement, but to other private streets to which the right of passage for conservancy and other purposes are not incident. This right is conferred by Sec. 416 in case of private streets in bustees under Sec. 416 (2). As against this contention, it may, however, be argued that the definition of "private street" in Sec. 3 (35) has universal application throughout the Act, and that there is no authority for otherwise limiting the connotation of the phrase in Sec 419 (4).

Having regard to the points submitted above Counsel will be pleased to advise .—

Whether after a notice given under Sec. 419 and huts having been removed from the site of the proposed streets or in case where there are no huts on the land shewn as streets in the standard plan, the General Committee could compel a party serving such notice to level, pave, metal, flag, channel, sewer, drain and light under the provisions of Sec. 361 those streets as shewn in the standard plan.

Whether Sec. 361 applies to making for the first time of a private street in bustees as per standard plan, or the same applies only for maintaining such private bustee streets or other private streets after the same have been constructed or made.

And generally as to the steps to be taken to have the private streets made or constructed after the service of notice under Sec. 419.

OPINION.

I am of opinion that after notice of intention to take any land but of the category of bustee land has been given

OPINION.—(*contd.*)

Secs. 419 & 361. *Private Streets in Bustees.* (contd)

under Sec. 419 of the Calcutta Municipal Act III of 1899, and after removal of the huts from the site of the proposed streets or where there are no huts on the land shewn as streets in the standard plan, the General Committee are not legally entitled to compel a party serving such notice to level or pave, etc., such streets shown in the plan, but not yet constructed.

Section 361 does not apply to making for the first time a private street in bustees, but in my opinion, it is applicable only to the maintenance or repair of private streets after the same have been constructed by any person under Sec. 358.

The Municipal Act contains no provision clearly indicating what are the proper steps to pursue in order to compel the construction of a private street in the circumstances under consideration in the present case.

The proviso to Sec. 419 (4) enacts that if any such land (*i e.*, land which by notice has been excluded from being bustee land) is shown on the plan as a street or part of a street, the same shall continue to be a private street, and shall be subject to the provisions of Sec. 416 (2); in other words it must be kept open for scavenging and other purposes of the Act. In view of this proviso it would seem that it would be competent to the General Committee to serve a written notice under Sec. 408, requiring the owner to carry out a portion of the improvements indicated by Schedule A, namely, the construction of the private street over his land, and in default of compliance by him, to carry out the work themselves under Sec. 409 and recover the cost from him. In considering the effect of Sec. 419, Mitra and Fletcher, J. J. however held that "it does not appear that the proviso compels the owner of a bustee to make a road according to the road indicated in a standard plan after the land has ceased to

OPINION.—(*concld.*)

Secs. 419 & 361. *Private Streets in Bustees.* (concld.)

be bustee land." This case was decided under the Criminal Revisional Jurisdiction of the High Court and if it be followed, the only course appears to be for the Corporation to construct such portion of the new street over the land which has been excluded from bustee at their own expense. But it might be considered advisable in view of the importance of the question to serve a notice on the owner under Sec. 408, and then bring a test case for argument before the Civil Side of the High Court, or possibly, in the event of non-compliance by the owner, for the Corporation to proceed under Sec. 409 to carry out the work and then sue the owner for the expense thereby incurred. This appears to be the only mode of obtaining a definite decision upon the point which has been raised.

G. H. B. KENRICK.

27th May, 1910. *Advocate-General.*

Fee for removal of unusually large quantities of refuse—Applicability to markets and bazars—Stall holders if Occupiers within the meaning of the section.

CASE.

(Submitted on behalf of the owner of the bazár).

Sec. 431. *Market Refuse. Fee for removal.*

Coomar Nogendra Mullik is the owner of two bazars situate at No. 204, Durmahatta Street and 356-1, Upper Chitpore Road respectively. The latter is a very large bazar known as Notun Bazar.

The Coomar pays to the Calcutta Municipality the usual rates or taxes, both owner's and occupier's share

CASE.—(*contd.*)

Sec. 431. *Market Refuse. Fee for Removal.* (contd.)

for the two bazars which amount in respect of Durmahatta Bazar to Rs. 321-10 per quarter (having only recently, this year, been increased by Rs. 48-10 per quarter) and to Rs. 1,196-0-6 per quarter for the Notun Bazar.

He also pays for a license under Secs. 198 and 199 amounting to Rs. 100 per year for each of the bazars.

Until the 24th August 1906 and for some years prior he used also to pay a scavenging tax assessed under Sec 203 amounting to Rs. 240 per half-year for the two bazars. This tax was on the above date cancelled by the Corporation under letter of that date. We are informed that the tax was withdrawn by the late Sir Charles Allen. After consideration of the matter and having regard to the heavy rates paid by market owners it was decided that the cost of removal of the refuse was amply covered by the rates paid and in the opinion of the then Advocate-General the imposition of an additional charge was illegal The reason given in the letter of the 24th August, 1906 from the Corporation withdrawing the imposition of the tax simply states that no scavenging fee under Sec. 203 is required to be paid unless animals are kept or sold therein. None are kept or sold in either of the bazars.

Recently a notice dated the 21st September, 1910 under Sec. 431 (b) of the Calcutta Municipal Act addressed to the occupiers of each of the bazars and signed by the District Engineer was affixed at the gate of each of the bazars stating that as, in the opinion of the Chairman, rubbish or offensive matter was accumulated in the premises in too considerable quantity to be deposited in any of the methods prescribed by the notice already issued under Sec. 430 of the Calcutta Municipal Act, he intended with effect from the 1st October to himself cause all rubbish or offensive matter accumulating in the above premises to be removed for such re-

CASE.—(*contd.*)

Sec. 431' *Market Refuse. Fee for Removal* (contd.)

per quarter in the other case) as fixed by the General Committee of the Corporation on the 16th September, 1910.

The Corporation's right to impose that tax or charge is questioned and Counsel's advice on this subject is requested.

It is true that the notice is addressed to the occupiers and so does not directly concern our client, the Coomar, who is the owner. He is indirectly affected and wishes to see that his tenants' rights are not prejudiced or they are unnecessarily harassed.

We should point out that there are numerous stall-holders in each of the bazars. There are also a considerable number of persons who are itinerant vendors of fruits, vegetables, etc., who have not stalls and who do not attend regularly and daily. They pay a daily rent and though the same person may not attend regularly there are numbers of these persons daily vending their food stuffs in the bazars. All these stall holders are obliged to pay for trade licenses under Sec. 198.

It is contended on behalf of the Coomar that Sec. 431 was never intended to apply to bazars.

In the first place the charge, if imposed, must be a most unjust one. Who is to pay it? In other words who are the occupiers of such a place as a bazar? A cloth merchant would have a large stall but no refuse or offensive matter accumulating; while an itinerant vegetable vendor may have quantities of offensive matter but no means of being got at. Then further in what proportions would the tax be recovered from the various stall-holders? The section does not empower the Chairman to apportion the payment of the charges but they are recoverable from the occupier. There is a Sec. 645 under which the Chairman can determine which of the occupiers are

CASE.—*(contd.)*

Sec. 431. *Market Refuse. Fee for Removal.* (contd.)

bound to perform any duty inposed upon occupiers but we don't see that this section applies inasmuch as it is only in cases where there are gradations of occupiers that the section is applicable. We refer to these points simply to show that on the face of the section it would be impossible to collect the charges without doing grave injustice.

The next point is, Sec. 431 is a section under Chapter XXVIII which is entitled 'Scavenging.'' As has already been shown, our client as owner is not required to pay a scavenging tax under Sec. 203 which is a section under Chapter XV entitled 'Scavenging Tax.' This would appear to be the only provision for a scavenging tax.

The tax under Sec. 203 specially relates to certain callings specified in Part I of Schedule IX referred to in that section and one of the callings mentioned in the Schedule is owner or occupier of a market or bazar. There are only eight callings mentioned in the schedule. Our contention is that it is only under Sec. 203 (if at all) that bazar owners or occupiers can be taxed and that Sec. 431 applies to cases other than those provided for by Sec. 203, otherwise a scavenging tax could be imposed on an occupier under Sec. 203 and a fee for scavenging under Sec. 431 on the same person.

The words of the latter section relate to premises which are used for carrying on any manufacture, trade, or business in the course of which offensive matter is accumulated.

The words 'rubbish' or 'offensive matter' occurring in Sec. 431 also occur in the proviso to Sec. 203. And as this latter section only applies to bazars where animals are kept, it would seem that as far as bazars are concerned the words refer to rubbish or offensive matter arising from keeping animals.

CASE.—(*concld.*)

Sec. 431 *Market Refuse. Fee for Removal.* (contd.)

Some correspondence has passed with the Corporation in connection with the matter which is briefed for information.

Counsel will be pleased to advise the Coomar on the position generally and also whether he cannot successfully contest on behalf of the occupiers that Sec. 431 does not apply to a bazar.

OPINION

Giving the matter my best consideration, I am disposed to agree with Mr. B. C. Mitter that Sec. 431 of the Calcutta Municipal Act is not intended to apply to markets or bazars. The difficulty of working the section in connection with bazars, so far as occupiers are concerned, makes me think that such application was not contemplated by the Legislature.

14*th December*, 1910. S. P. SINHA.

CASE

(Submitted by the Corporation.)

A question has arisen as to whether or not Sec. 431 applies to markets. Market is defined in Sec. 3 (24). A license is required for keeping open a private market, *vide* Sec. 481. Under Sec. 198 the owner or lessee of a market or bazar has to take a trade license, Schedule II. Under Sec. 203 a scavenging tax is also payable by the owner or lessee of a market where animals are kept (Schedule IX). This scavenging tax used to be levied from almost all owners of markets and bazars without regard to the fact as to whether there were any animals or not but this tax has been discontinued since 1906,

CASE.—(*contd.*)

Sec. 431. *Market Refuse. Fee for Removal.* (contd.)

The General Committee has lately fixed a fee under Sec. 431 (b) and the Chairman is desirous of enforcing the payment of such fee.

It is to be noted that Sec. 431 (a) and (b) speaks of notice to the occupier of such premises; assuming that premises include a market, who is to be deemed the occupier of a market? Is it the lessee assuming that there is a lease or in the absence of any lease, are the stall-keepers and other vendors who pay any rent or toll to be deemed occupiers?

A stall-keeper may be an occupier and it may very well be that in the course of the business carried on by him no rubbish or offensive matter is accumulated *e.g* , a cloth-dealer having a shop in a market or a person keeping a stationery shop. There is no indication as to the apportionment of the fee payable under Sec. 431 (b) amongst occupiers. Occupier is defined in Sec. 3 (30) as any person paying or liable to pay to the owner the rent or any portion of the rent of the land or building, etc. Sec. 645 may also be referred to dealing with the question of gradations of owners or occupiers. Sec. 430 should also be noted which speaks of *any premises*. Sec. 431 speaks of premises used for carrying on any manufacture, trade or business in the course of which rubbish etc. is accumulated; strictly speaking, it would be difficult to apply this to individual stall keepers in a market or bazar. It should also be noticed that under Sec. 620 (b) the fee imposed is recoverable as consolidated rate by distress and sale of moveable property. Sec. 215 may be noted in this connection. It is also to be noted that there is a separate chapter on markets, bazars and slaughter-houses, Secs. 477 to 488.

Section 559, Clauses (32), (33), (35), (36), refer to bye-laws relating to markets. It is no doubt very desirable

CASE.—(*concld.*)

Sec. 431. *Market Refuse. Fee for Removal.* (contd.)

that having regard to the considerable quantity of refuse accumulating in some of the markets, etc., the removal of it from markets should not be done in the ordinary way at the expense of the Corporation, in other words at the expense of the general body of rate-payers, but that the owner or other person responsible for the keeping of the market should bear the necessary expense.

If Sec. 431 applies to markets and bazars, then having regard to Sec. 203, Schedule IX in respect of a market or bazar two fees will be payable and recoverable, one under Sec. 203 and another under Sec. 431.

Further under Sec. 203 the owner may be called upon to pay the required fee whereas under Sec. 431 the occupier is liable to pay the fee.

Having regard to all these circumstances Counsel will be pleased to advise whether the General Committee is competent to charge a fee in respect of a market and enforce payment thereof against an occupier or all the occupiers of the market under Sec. 431?

Can the fee fixed and made payable quarterly be held to be a periodical fee within the meaning of the section?

And generally as to the scope and operation of the section.

OPINION.

1. In my opinion the General Committee is not competent to charge a fee in respect of a market and enforce payment thereof against an occupier or all the occupiers of the market under Sec. 431.

2. In my opinion the fee that has been fixed by the General Committee and made payable quarterly cannot be held to be a periodical fee within the meaning of the section.

OPINION.—(*contd.*)

Sec. 431. *Market Refuse. Fee for Removal.* (contd.)

3. The difficulty of working the section in connection with markets, and its apparent inapplicability to the occupiers of a market alluded to by Mr. Sinha are *prima facie* reasons why the section should not be applicable to markets and suggests a presumption that it is not intended to apply to them. But the reasons are not conclusive.. The section upon its true construction, may, notwithstanding its inappropriateness, be in fact applicable to markets.

But in my opinion, upon its proper and true construction, it is not applicable.

A stall-holder or other vendor in a market is not, either under the definition of "*occupier*" in Sec. 3 (30) of the Municipal Act, or in reality, the occupier of the market. He is only an occupier of part of the market.

On the other hand the *premises* referred to in, and forming the subject of the provisions of Sec. 431, clearly mean, in the sense I will endeavour to explain, *one* premises only (if I may use the expression) forming the subject of *one* occupation only, and upon which *one* manufacture, trade or business only is carried on. When I say "*one premises*" I mean a holding or subject of occupation which as regards the situation of all its parts may be regarded as one distinct piece of property; and by "one occupation" I mean, not that there may not be several persons who are in occupation of the premises, but that they all occupy *the whole* of the premises, not some of them occupying part only, and others, or another of them occupying other parts or part of the premises; and by "*one manufacture, trade or business*" I mean that it may be one manufacture, trade or business only, or it may be more than one, provided that they are all carried on by all the occupiers of the premises as their joint manufacture, trade or business. And the "too considerable quantity of rubbish etc." referred to in the section, must

OPINION.—(*concld.*)

Sec. 431. *Market Refuse. Fee for Removal.* (concld.)

be the outcome not of several or more than one of the several separate holdings (which together form "a market") but of a single one of them only.

Read in this sense, Sec. 431 and its provisions are inapplicable to a market, and cannot be construed to refer to or include it. The "premises" mentioned in the section do not mean the aggregate of the holdings of the several stall holders or vendors in the market, but only the portion of the market occupied by one single stall keeper or vendor, the "occupier" referred to does not mean or refer to the aggregate of the stall holders or vendors in the market but the occupiers or joint occupiers only of one only of the several holdings in the market, "the manufacture, trade or business" referred to does not mean the aggregate manufactures, trades or businesses carried on by all the stall holders and other vendors in the market, but only the manufacture, trade or business, or manufactures, trades or businesses carried on by the occupier or joint occupiers of one only of the several holdings in the market; and finally the excessive quantity of rubbish etc., in respect of which the provisions of Sec. (431) may be brought into force must be the outcome of one only of the several separate holdings in the market, and not of the whole or several, or more than one, of such holdings

25*th August*, 1911. T. R. STOKOE.,

Erection of structures on land sold by Corporation, in contravention of conditions of sale—Remedy of Corporation—Admissibility of proceedings under Sec. 449.

CASE

Sec. 449. *Demolition of Structures erected in contravention of conditions of sale of land.*

The Corporation of Calcutta by an Indenture of Conveyance dated the 27th day of February, 1907, assigned and sold to Babu Nanda Lal Gupta of No. 7, Gupta's Lane the filled-up unsewered ditch running from Gupta's Lane to Boloram Dey Street and also the filled-in sewered ditch running from north to south between the premises No. 7, Gupta's Lane on the west and premises Nos. 155 to 160, Boloram Dey Street on the east, subject to the conditions therein mentioned. It was therein expressly provided that whenever the existing house drains connected with the said sewer should be altered so as to be connected with the sewer in Boloram Dey Street then the said Babu Nanda Lal Gupta should be at liberty to stop up, alter, or otherwise deal with the said sewer as his exclusive property, and in such manner as he might think fit but so long as the said existing house drains or any of them remained connected with the said sewer he should not be at liberty to interfere therewith so as to affect its use as a sewer.

The said Babu Nanda Lal Gupta also covenanted that he would not build on the site of the sewered ditch so long as the said sewer is maintained as such sewer as aforesaid without the sanction of the General Committee or the Corporation first had and obtained in that behalf and also undertook to indemnify the Corporation against all actions, suits, damages, claims or demands in respect of the said ditch and in respect of all rights of light and other easements affecting the same or the existing rights of parties in, over, under or upon the same.

CASE.—(*concld.*)

Sec. 449 *Demolition of Structures erected in contravention of conditions of sale of land.* (contd.)

The then existing drainage connections in the said sewered ditch have not been diverted. In other words they have not been connected with the sewer in Boloram Dey Street.

But in contravention of the terms of the said conveyance Babu Nanda Lal Gupta has built certain structures over the said sewered ditch.

Babu Nanda Lal Gupta being referred to replied through his attorney denying that any structures had been erected in contravention of the aforesaid agreement.

These structures have been built without any sanction from any Municipal Authorities though not in infringement of any bye-law contained in Schedule XVII of Act III (B.C.) of 1899. Section 449 of the Calcutta Municipal Act should be referred to.

It is to be considered whether having regard to the terms of the conveyance, it is a matter of a civil suit between the parties or whether notwithstanding the said conveyance the Municipal Authorities are entitled to proceed against Babu Nanda Lal Gupta under Sec. 449 for the demolition of the structures assuming those structures have been put up more than six months ago.

It may not be out of place to note here that no question of limitation can arise in matters of application for demolition of unauthorised structures under Sec. 449.

Under the circumstances Counsel will be pleased to advise :—

What steps should be taken against Babu Nanda Lal Gupta for the removal of the structures erected by him, whether (a) Civil suit for breach of the covenant, or (b) proceedings under Section 449 of the Calcutta Municipal Act should be instituted against him.

OPINION.

Sec. 449. *Demolition of Structures erected in contravention of conditions of sale of land.* (concld.)

I do not think any proceedings which may now be taken against Babu Nanda Lal Gupta will be effective.

A prosecution under Sec. 449 is probably tenable, as no sanction was obtained. But it can result only in the infliction of a fine and not in an order for demolition, as the buildings are not in violation of any bye-law under Schedule XVII; and even as to a fine, there is a serious question of limitation. A Civil suit for damages will lie; but what damages can the Corporation claim, except nominal damages? They have not sustained any. The result of such a suit will be a decree for nominal damages and costs (less than what will be actually spent) and that only if the Corporation proves the infringement. It does not seem to me to be worth while bringing such a suit. If the Corporation had brought a suit while the buildings were in progress, they might have stopped them by injunction and possibly obtained an order for demolition, if they were alert about it. It is too late now to ask for a mandatory injunction.

10*th June*, 1912. S. P. SINHA.

Stables, Cattle Sheds etc.—General Committee's survey and control under Sec. 456 (1), *Effect of—If Chairman's jurisdiction to sanction building for stable under Sec.* 378 *and to grant license under Sec.* 466 *ousted thereby.*

CASE.

Secs. 456, &c. *Stables. G. C's. powers of general control not ousting Chairman's jurisdiction under Secs.* 378 & 466.

No formal case would appear to have been submitted; but only the meeting proceedings connected with the matter were laid before Counsel. The facts of the case were :—

Early in 1911 a plan was submitted for building a stable at [redacted] Sobhabazar Lane. The

CASE.—(*concld.*)

Secs 456, &c Stables. G C's. powers of general control not ousting Chairman's jurisdiction under Secs 373 & 466. (contd.)

Health Officer inspected the site and refused to recommend sanction unless certain improvements which he indicated were provided for. This was complied with and revised plans were submitted and were sanctioned in July. The building was commenced early in August. A petition was received on behalf of the residents of the locality protesting against the establishment of a stable and on the 8th September, 1911 the General Committee resolved that in view of the narrowness of the lane license would be refused. To this the party objected, and threatened to institute proceedings on the ground that relying on the sanction already granted he had expended a large sum in constructing the stable and the sudden refusal to grant a license had put him to considerable loss. The question thereupon arose whether in view of these facts it was open to the General Committee to consider the case at this stage in the absence of an application for license, and whether Sec. 456 would apply to the case of any particular stable or only gave the General Committee powers of general survey and control.

OPINION.

The question upon which my opinion is asked is whether the provisions of Sec. 456 oust the jurisdiction of the Chairman under Sec. 373 and Sec. 466?

As regards Sec. 466, it is clear that Sec. 456 does not affect the powers of the Chairman to grant or refuse a license under Clause (c) of Sec. 466 (1). An appeal is provided by Sec. 468, from any refusal by the Chairman to grant such a license and such appeal lies to the General Committee. They have no other powers in connection with such license.

As regards Sec. 373, which relates to all masonry buildings (and Sec. 386 which relates to huts), the

Opinion.—(*concld.*)

Chairman is the authority whose permission is necessary before such buildings or huts can be erected. These sections apply to buildings and huts which are intended to be used as stables, cattle sheds and cow houses, [*see* Schedule XVII, Rule 31, Explanation to Clause V, and Rule 47 (2)].

Secs. 456 &c., Stables. G. C's. powers of general control not ousting Chairman's jurisdiction under Secs. 373 & 466. (concld.)

Section 456 does not take away the Chairman's jurisdiction under Secs. 373 and 386.

The General Committee has no doubt general powers of control over stables, cattle sheds and cow houses, as regards their site, construction, materials and dimensions; and they may under Sec. 559, Clause (26) make bye-laws specifying the manner in which stables, cattle sheds and cow houses are to be constructed and connected with the Municipal drains.

I find that in fact they have made such bye-laws. But their power of control cannot be exercised so as to set aside a sanction already given by the Chairman and acted upon by the person to whom it is given. Even if the right of control carries with it the right to refuse assent to a proposed sanction by the Chairman, I do not think, such right can be exercised in a case where the sanction has been given and acted upon.

15*th May*, 1912. S. P. Sinha.

Theatre Bye-laws—Licensing of Theatres

Case.

Not available.

Opinion.

I agree with the opinion of Mr. Stokoe, dated 18th *September, 1907 that Sec. 559 (52) does not empower the General Committee to make a bye-law prescribing

Sec. 559 (52.) Licensing of Theatres.

* *Vide* Pages 89-91 of 2nd Volume of Legal Opinions and Rulings.

OPINION.—(*concld.*)

Sec. 559 (52) *Licensing of Theatres.* (concld.)

that no place shall be used as a theatre otherwise than under a license, to which certain conditions will be attached. This will be more than "regulation."

But even if Sec. 559 (52) be assumed to confer such a power, I think the Corporation will be in no better situation when such a bye-law is made than they are in at present. A person who breaks the conditions of that license or without obtaining any such license continues to use the theatre, etc., will be guilty of a breach of the bye-law only, and the General Committee cannot prescribe any higher penalty for such breach than is authorised by Sec. 561. I am given to understand that such penalty has in practice been found inadequate.

If a greater penalty is considered desirable in the interests of the public, nothing short of an amendment of the Act can confer such power.

18*th March*, 1912. S. P. SINHA.

Municipal Market—Stall holders and shop-keepers—Their Assessment to License Tax.

CASE.

Sch. II. *License Tax. Municipal Market Stall keepers.*

This case relates to the amount of the license tax payable by keepers of permanent stalls in a Municipal Market.

Section 198 of the Calcutta Municipal Act coupled with Schedule II bears on this question.

There is no definition of what a permanent stall or keeper of a permanent stall is. Municipal Market is defined in Sec. 3 (27) and "market" is defined in Clause (24) of the same section. Licenses are of two classes —Personal and Local *vide* Schedule II, Rule (1), (2).

CASE.—(*contd.*)

Sch. II. *License Tax. Municipal Market Stall keepers.* (contd.)

Class V, Item No. 33, Schedule II fixes the amount at Rs. 12. It is suggested that this does not preclude the Municipal authorities from assessing keepers of permanent stalls to the tax on the footing that they are liable to take out a local license. The amount of the tax in cases of local license is based upon the rent payable *vide* items 7 Class II, 13 Class III, 28 Class IV, 38 Class V, 43 Class VI.

	Rs.
Item 7 Class II relates to retail trader or shop-keeper whose place of business is is valued at Rs. 350 per mensem as therein mentioned	100
Item 13 Class III relates to such trader or shop-keeper whose place of business is valued at Rs. 100 or upwards as therein mentioned	50
Item 28 Class IV relates to such retail trader or shop-keeper whose place of business is valued at Rs. 25 or upwards . .	25
Item 38 Class V relates likewise to places of business valued at Rs. 10 or upwards ...	12
Item 43 Class VI relates to those who are not included in any other class ...	4

It is to be noted that the Corporation merely lets the space in the Market to the stall-keeper and he puts up his stall *i.e.*, all structures, fittings, furniture and appurtenances are put up by the stall-keeper at his own cost and the same belong to him and he is at liberty to remove them when he ceases to be a stall keeper.

It is to be noted also that keepers of permanent stalls would command a larger number of customers than others having no assigned and definite place in such a Market.

CASE.—(*contd.*)

Sch II. *License Tax. Municipal Market Stall keepers.* (contd.)

It is also submitted for the learned Counsel's information that up to now the classification of tenants in a Municipal Market has been as follows:—Stall-keepers, shop-keepers, and squatters.

Shops and stalls are constructed and put up by the keepers thereof respectively as stated above. The Corporation has divided the Municipal Market into several blocks or ranges for the sale of specific goods or articles *e g*, meat stalls. These are placed in a particular range for the sale of meat. Fruits and vegetables are similarly sold in a particular range.

Shop-keepers, stall-holders and squatters are either monthly or daily tenants. They have no permanency in any shop, stall or place in the market whatsoever. At the same time there is no reason to suppose that they would be disturbed in the possession of their stalls or shops unnecessarily or without any sufficient reason and as a matter of fact it is not out of place to state here that they have continued to hold a particular shop or stall for years together.

The difficulty arises from the use of the word permanent stall in item 33 of Schedule II—the word shop is not there. How is the expression to be construed having regard to the facts and circumstances stated above?

Is there any valid distinction between a shop and a permanent stall in a market for the purpose of the license tax? Some of the shop-keepers and stall-holders have been assessed on the rental basis of their shops or stalls at the market?

It is argued on the other hand that all keepers of stalls and shops in the market should be treated under Class V, item 33 and pay Rs. 12 as license tax and that they cannot be brought under any of the other higher classes of shop-keepers, Classes II, III, and IV. In

CASE.—(*contd.*)

Sch. II. *License Tax. Municipal Market Stall keepers.* (contd.)

other words the value of their place of business or holding on the basis of monthly rental cannot be taken into account in assessing the tax.

Item 33 is a special item with reference to shop-keepers and stall-holders at a daily public market and the Municipal Market being a daily public market, stall-keepers and shop-keepers thereat cannot be classed under any other article or item in the said Schedule II. Shop-keepers and stall-holders beyond 50 yards of a public market or bazar might be assessed on the rental basis as indicated in the several classes above referred to. A note by the License Officer to the Corporation is hereto annexed.

The learned Counsel will be pleased to advise as to how the keepers of stalls and shops in the Municipal Market should be assessed to the license tax.

License Officer's note.

It is evident that item No 33, Schedule II has been introduced with the object that as stall-keepers in a market are expected to command a larger sale than the shop keepers outside the market, the stall-keepers in the market are required to pay Rs. 12 even if the monthly rent is below Rs. 10. This has been done so that the shop-keepers outside the market may not be put under any disadvantageous circumstances. If on the other hand the stall-keeper in a market is not allowed to be assessed according to rent his advantageous position will be evident from the following example:—

A stall-keeper in a market paying rent of Rs. 30 will pay Rs. 12 only whereas a shop-keeper outside the market paying Rs. 30 will have to pay Rs. 25 though the stall-keeper in a market is expected to command a larger sale. This seems to be incongruous

CASE.—(*concld.*)

Sch. II. *License Tax Municipal Market Stall keepers.* (contd.)

and it cannot therefore be held that the stall-keeper in a market otherwise assessable in a higher class, should not be so assessed. Item No. 33 fixes only the lowest class of license in respect of places of business in a market and does not bring all places to Class V.

OPINION.

I am of opinion that the keepers of stalls and shops in the Municipal Market are liable under Sec. 198 and Schedule II, Class V, Item 33 of the Calcutta Municipal Act, to be assessed to an annual license fee of Rs. 12. The keeper of a permanent stall at a daily public market or bazar or of a shop within fifty yards of a public market or bazar who is a seller of goods similar in kind to other goods sold in such public market or bazar is placed in a particular category and assessable to an annual fee of Rs. 12. The stall-keepers in the Municipal Market, on the facts as stated in the case, would seem to be keepers of permanent stalls at a daily public market within the meaning of the Act. Keepers of permanent stalls at a market and of shops within fifty yards of a market selling market goods, are, in my view of the construction of Schedule II, Class V, 33 of the Act, expressly excluded from the classes of shop-keepers whose license fees are assessable upon the basis of the monthly value (or rent) of their places of business. If this view be correct, such stall-keepers and shop-keepers cannot legally be assessed according to the rent which they may be paying in respect of their stalls in the market or shops within fifty yards of the market but are liable only to the fixed annual license fee. If any of them are in fact paying amounts assessed according to rental value it would be open to them to contest the validity of such assessment in the courts. On the other hand the

Opinion.—(*concld.*)

License Officer's view is arguable, but if the Corporation wish to justify the levying of an *ad valorem* license fee they should do so by raising the question by means of a test case.

Sch. II. *License Tax. Municipal Market Stall keepers.* (concld.)

G. H. B. Kenrick,
Advocate-General.

15*th December*, 1909.

Fee for approval of placing of master traps in footpaths, etc, Legality of

Case.

Section 586 of the Act provides for the restrictions and conditions subject to which any license or written permission may be granted under this Act.

Sch XV. Rule 6 (2)(b). *Fee for master-traps in footpaths.*

Section 586 (2) provides for the charging of a fee as therein mentioned. The fee to be fixed by the Chairman with the sanction of the Corporation.

A question has arisen as to whether the General Committee can lawfully charge a fee for allowing a master-trap to be placed in the footpath.

Under Rule 6 (2) (a) and (b) Schedule XV, a person with the approval of the General Committee may place a trap in the footpath or in the roadway adjacent to the building.

The General Committee think as the footpath or the roadway belongs to or is vested in the Corporation they can charge any reasonable fee for permitting anything to be done or placed thereon. On the other hand it is submitted that to enable a statutory body like the Corporation or the General Committee to charge a fee for anything allowed or permitted to be done pursuant to the provisions of the Act, express authority under the Act is needed.

CASE.—(*concld.*)

Sch. XV. Rule 6 (2)(b). *Fee for master-traps in footpaths.* (concld.)

Sections 295, 340 (4), 463, 466, 467 and 481 (2) refer to written permissions or licenses and expressly provide for the charging of fees.

Counsel will be pleased to advise—

Whether the General Committee can charge a fee for their approval under Rule 6 (b) as above stated.

OPINION.

I am of opinion that the General Committee are not empowered to charge a fee for or in respect of their approval of the placing of a house drainage trap in a footpath or roadway adjacent to the building under Rule 6 (2) (b). The provisions of Sec. 586 which enable a fee to be charged for every license or written permission granted under the Act do not appear to be applicable to a mere approval of the General Committee under Rule 6. I have carefully considered the various sections of the act under which a "written permission" or "a license" from the General Committee or the Chairman is rendered necessary. In each of these sections it is observable that the term "license" or "written permission" is specifically used. It is to such licenses or written permissions that the provisions of Sec. 586 as to duration, conditions, signature, revocation, production, the fee chargeable, etc., are intended to apply, and in my opinion, to those only.

G. H. B. KENRICK.
Advocate-General.

23*rd May*, 1910.

Gas Contract—Compensation payable to Gas Company in the event of introduction of Electric Lighting —Meaning of "piping" in Clause 25—Uneven pressure being unavoidable and suitability of nipple, How to be determined.

CASE.

Difficulty has arisen as to the fulfilment of the terms of a new contract. *Gas Contract.*

There is a subsisting gas contract which will expire on the 30th April, next and another new contract will commence from 1st May, 1911.

The new contract is based on the footing that the Gas Company will supply gas only. Clauses 1, 2, 3, 5, 9, and 19 shew what the Gas Company has got to do under the new agreement. Clause 4 shows the obligation of the Corporation. Clauses 24 and 25 provide for Corporation's liability to pay for 9,000 lamps and also compensation as therein mentioned. Counsel's special attention is invited to Clause 25. Clauses 28 to 30 relate to pressure. Clause 41 provides for penalty in case pressure be less than what is provided for in the agreement. Clauses 37, 38, 39 should also be noted.

(1) If now the Corporation desires to use electric lights in some parts of the town already lit with gas, Counsel will please advise what steps should the Corporation take?

(2) What is the effect of Clauses 24 and 25 assuming that the Corporation reduces the number of lamps to say 8,500, the present number of lamps being 9,487.

(3) Assuming that the pressure in some places be 3 inches during the last five years, could the Gas Company claim more than Rs. 2-8-0 per 1,000 c.ft. as provided in Clause 39?

CASE.—(*concld.*)

Gas Contract. (contd.)

(4) Counsel will be pleased to consider Clause 87 and give his views as to how the Corporation is to be satisfied of the unevenness of the pressure being unavoidable and likely to be permanent and how the suitability of the nipples to be tested should be determined as therein mentioned?

(5) Assuming that if the Gas Company be not in a position to supply gas at not less than 2" pressure to all the public lights as on and from 1st May 1911 and the Corporation also be not in a position to change all the burners (the existing burners not admitting of change of nipples) can the contract be cancelled on the ground that one or both the parties is or are not prepared to perform the contract?

(6) And to advise the Corporation generally.

OPINION.

(1) The Corporation is at liberty to use electricity for the public lighting of any part of Calcutta which is now lit with gas without giving any notice to the Gas Company.

(2) Clause 24 refers to the case where no illuminant other than gas is used for the parts of Calcutta now lighted with gas. If in such a case the lights are reduced below 9,000 (the present number being 9,437) the Corporation shall still pay as if 9,000 lights were burning.

Clause 25 refers to the case where some illuminant other than gas *e.g.*, electricity, is used in any part of Calcutta now lighted with gas. *Here there is no question of 9,000 lights.* The Corporation shall have of course to pay for the gas lights still left *i.e.*, 8,500 as assumed in question 2 *i.e.*, for the actual gas consumed by these 8,500 lights. *In addition* it will have to indemnify the Gas Company for loss by the disuse of any piping for

OPINION.—(*contd.*)

Gas Contract. (contd.)

the public gas lights which are discontinued, such loss being calculated on (a) the capital outlay for such disused piping and (b) the profits which such piping would have earned by supplying gas to the discontinued lights.

(3) As I understand Clause 39, the rate per 1,000 c.ft. varies with the minimum pressure for the time being. Thus the rate will be Rs. 2-8 per 1,000 c.ft. for the first five years and thereafter though the minimum pressure will be raised to 2½ inches the rate will continue to be Rs. 2-8 per 1,000 c.ft. until the minimum pressure is on the demand of the Corporation further raised, when the rates will be Rs. 2-8-6, Rs. 2-9, Rs. 2-9-6 according as in pursuance of such demand it is raised to 3, 3½ and 4 inches respectively. The rate of any particular time will be the same for a 1,000 c.ft. of gas supplied irrespective of the pressure at which it has been supplied (*See* Clause 5). In measuring the actual quantity of gas supplied under Clause 37, the different pressures at which the gas has been supplied must be taken into account because a nipple which consumes say 10 c.ft., at a pressure of 2 inches will consume more at a pressure of 3 inches. Clause 37 therefore provides that "the pressure will be carefully adjusted" to the pressure at which it is desired to know the consumption of gas by the nipple.

The average hourly consumption of gas by 30 of one size of nipple selected at random at any one pressure tested in the manner.....as the hourly consumption of gas by this size of nipple when used in a public lamp at the pressure at which it was tested. It is clear that the pressure at which each nipple is tested is considered as varying and requiring to be adjusted. If the minimum pressure was meant, nothing would have been easier than to say so, but as it is intended that the consumption of gas of each burner should be ascertained (see

OPINION.—(*contd.*)

Gas Contract. (contd.)

last sentence of Clause 37) it is necessary to know with reference to each burner (1) the size of nipple attached to that burner, (2) the pressure at which gas has been supplied to that burner. The latter can be ascertained under the procedure mentioned in Clause 40. The following examples will illustrate this; suppose there are 9,000 lights in 2 Districts A and B with two different sizes of nipples, distributed as follows :—

District A,	2,000	lights with	(a) nipples.
and	3,000	Do.	(b) nipples.
District B,	2,000	lights with	(a) nipples.
and	2,000	Do.	(b) nipples.

30 nipples of size (a) and 30 nipples of size (b) will be tested under Clause 37. If the average pressure for District A is found to be 2 inches and that for District B 3 inches the nipples will be tested under both those pressures for the purpose of finding out their respective consumption at each of those pressures.

Suppose it is found that nipple (a) consumes 10 c.ft. at 2 inches and 15 c.ft. at 3 inches pressure and nipple (b) consumes 20 and 30 c.ft. respectively. The total consumption will then be as follows :—

District A	...	... 2,000 × 10 (a)
		3,000 × 20 (b)
District B	...	... 2,000 × 15 (a)
		2,000 × 30 (b)
	Total	... 1,70,000 c.ft.

This will have to be paid for at the rate of Rs. 2-8 when the minimum pressure is 2 or 2½ inches and at increased rates when the minimum pressure is increased on the demand of the Corporation. The only sentence in Clause 37 which presents any difficulty, so far as the

OPINION.—(*contd.*)

Gas Contract. (contd.)

above construction is concerned is that which begins "should it be found" etc. This assumes that even distribution of pressure throughout Calcutta will be the usual and normal state of things which is improbable if not impossible. I think that to make it consistent with the rest of the contract it should be read as follows:

The pressure for any district is expected to be uniform, so far as all the lights in that district are concerned. But it may happen that some lights in that district are supplied permanently at a higher pressure than the others (the majority) in which case the nipples tested at the average District pressure will shew less than the actual consumption. So it is provided, in favour of the Gas Company, that *and-nd* these former lights (*i e.*, those supplied at a higher pressure than the average district pressure) the test will be with nipples of a size suitable to the actual pressure for those particular lights.

(5) The contract consists of reciprocal promises which are to be performed in the order which the nature of the transaction requires (Sec. 2, Contract Act.) I see nothing in the contract which requires the Corporation to change all the burners but assuming that they are so bound it seems to me that the Company must be ready to supply the gas at the required minimum pressure before it can call upon the Corporation to change the burners. If the Company is not so ready, it must make compensation but, I do not think that on a proper construction of the contract the Corporation can rescind the contract for that reason.

If the Company fails to supply according to contract to ¼th or more of the town, for more than 3 months the Corporation can determine the agreement in the manner provided by Clause 45.

OPINION.—(*concld.*)

Gas Contract. (contd.)

(6) Generally the contract under consideration seems to me to be in many respects ambiguous and difficult to construe and I feel bound to state my opinion that it seems to have been framed without due regard being paid to the interests of the Corporation. In particular, the Gas Company seems to be under no restriction as to the pressure at which it will supply gas to the public lights, as long as it does not fall below 2 inches for the first 5 years and thereafter 2½ inches. I consider this a matter of regret in the public interests.

C. P. HILL.

I agree.

1*st March*, 1911. S. P. SINHA.

Gas Contract—Compensation in the event of introduction of Electric Lighting—"Piping" and "Public Lamp," scope of expression.

CASE.

(1) Does the word "piping" in Clause 25 include gas mains under this Agreement (for the word piping Clauses 1, 2, 19, 20, 21, 25, 39 may be referred to.)

(2) Having regard to Clauses 24 and 25, especially the latter which provides for payment of such compensation as will indemnify the Gas Company from loss by the disuse of any piping which has been fixed for supplying gas to public lights, etc., and as to how the amount of such compensation is to be calculated: Counsel will be pleased to indicate the effect of these clauses in both instances, namely, *firstly*, when electric light is introduced and the minimum number of lights is maintained at 9,000, and *secondly*, when it is reduced below 9,000.

CASE.—(*concld.*)

Is the concluding portion of the clause consistent with the principle of indemnity? *Gas Contract.* (contd.)

(3) Assuming that some of the gas mains serve to feed the public lights as well as private lights, can the Gas Company claim any amount by way of compensation for loss by the disuse of mains in case where some public gas lights (over and above 9,000) are discontinued and electric lights introduced. How is the capital outlay on piping as mentioned in Clause 25 to be determined in case the Corporation discontinues some intervening lights but retains lights at both ends of a series of lights supplied by a main?

4. . Can the Corporation compel the Gas Company to lay mains on both sides of a street having regard to Clause 21 of the Agreement?

(5) And generally whether "public lights" referred to in Clause 21 include lights in Municipal Markets, Municipal Slaughter-houses, etc.

OPINION.

(1) In my opinion the word "piping" in Clause 25 includes gas mains under the Agreement. The words "piping" and "pipes" in the Agreement are each used to mean "main" and "service" and "other" piping or pipes—thus in the recitals it is stated that the Company have expended large sums in laying down "main and other pipes" for the distribution of gas in the town and suburbs of Calcutta; Clause 1 speaks of replacing the existing "main and service piping" with "pipes" of larger dimensions; Clause 20 refers to injury caused to the "main or service piping" belonging to the Company by excavations made for or on behalf of the Corporation; and under Clause 21 the Corporation may extend the area of public lighting, in which case the Com-

OPINION.—(*contd.*)

Gas Contract. (contd.)

pany are bound to connect their "main and service piping" to the new lamps and so on. When therefore the word "piping" or "pipes" is used without stating what description of piping or pipes is referred to, it will include all descriptions that are not excluded by the context.

(2) In my opinion the compensation would be payable, and calculated as follows: as regards the first head of compensation, capital outlay on piping—it would not be payable in respect of piping which, though no longer serving to supply gas to the discontinued lights, continued to serve to supply gas to other lights situated beyond the discontinued lights, and which (and whether they were public or private lights) were not discontinued. And as regards the second head of compensation—the amount which the piping would have earned for the Company if its use had been continued to the end of the Agreement—it would be the same whether the minimum number of lights was maintained at 9,000, or was reduced below that number. Having regard to the frame of the clause, its concluding portion may, I think, be considered consistent with the principle of the indemnity which the clause is designed to afford.

But the clause is not as clearly expressed as it might have been; and although I consider the construction I have put upon it the proper one, it is perhaps a doubtful question.

3. This question, if I understand it, is answered by the last answer. The first head of compensation there mentioned would not, in my opinion, be payable, but the second would.

4. I think (and notwithstanding that clause 23 may seem opposed to such a construction of the Agreement) that it is for the Corporation to determine from time to

OPINION.—(*concld.*)

time what public lights are required for the lighting of Calcutta; and for them to determine where for that purpose the lamps shall be placed, and that they may if they think proper have lamps on both sides of a street—and that the Company are bound to supply gas for such lamps. And if, in order to provide for such supply it is necessary to have mains laid on both sides of the street, the Corporation, in my opinion, have the right to require the Company so to lay them. But not otherwise.

(5) This again is a question regarding which the Agreement should have been clearer than it is. The recitals speak of "public lamps" and "public street gas lamps", as if they did not necessarily mean the same thing, and one of the deeds recited relates to the supply of all gas that may be required for municipal purposes in the suburbs of Calcutta (which in the Agreement are included in its references to Calcutta). In the operative part of the agreement the expression used is almost invariably "public lights" and the distinction between "public lights" and "public street lights" does not appear. And the only clauses in which, I think, the expressions "public lamp" and "public street lamps" occur, *viz.*, 7, 18, and 45, rather, I think, convey the impression that the Agreement is intended to apply only to street lamps. And I come to the conclusion, though not without some doubt about it, that the public lights referred to in Clause 21 do not include lights in Municipal Markets or Municipal Slaughter-houses.

9th January, 1912. T. R. STOKOE.

Hackney Carriage Horses' Number Discs—Payment for, Legality of.

CASE.

Hackney Carriage Horses' Discs.

The Corporation has sanctioned an expenditure of Rs. 3,812-8-3 for the supply of some discs, lead seals bronze wire. etc., in connection with the numbering of hackney carriage horses, on the recommendation of the General Committee.

Some of the Commissioners have taken exception to the sanction for such expenditure on the ground that such expenditure is not required for carrying out any of the purposes of the Calcutta Municipal Act and they also urge that it is not permissible under he Hackney Carriage Act (Act II B.C. of 1891) either. They also rely upon the fact that before obtaining the supply of the articles in question no tender had been called for as laid down in Section 88 of the Calcutta Municipal Act nor has any contract in writing been entered into by the Chairman with the Contractors for the supply of these articles.

They also contend that there is nothing in the Hackney Carriage Act empowering the Corporation or the Registrar of Hackney Carriages to insist upon the use of these discs etc., in connection with the registration of Hackney Carriages and licensing of drivers under the Act, and hence it would not be lawful to incur this expenditure whether out of the Municipal Funds or the Hackney Carriage Fund.

On the other hand, in support of the Corporation's competency or power to incur the expenditure in question, Counsel's attention is invited to the following sections of the Calcutta Municipal Act:—Secs. 14 (xi), 104-2 (ii) and Secs. 9, 53 (c), (d) and (e) and 60 of the Hackney Carriage Act II B.C. of 1891.

CASE.—(*contd.*)

Hackney Carriage Horses' Discs (contd.)

It is with a view to promote public convenience that the improvement of the Hackney Carriage service has been sought for and as an experimental measure these discs were introduced. The Press and the Government both approved of the measure. Two objects were secured; only sound horses could be used and only such as had been examined by the authorities could be used. As however legal difficulties were raised as to the competency of the Corporation to insist upon the affixing of these discs it was thought fit not to press for their adoption of these discs by the Hackney Carriage owners. Nevertheless the expenditure was incurred by the Chairman in all good faith for the improvement of the Hackney Carriage service and although the purpose, which the discs were intended to secure, is not specially mentioned in the Act it is submitted that the wording of Sec. 60 *ibid* is sufficiently wide and general to justify expenditure intended to secure sound and fit horses which are obviously necessary for an efficient service. The attention of Counsel is also invited to Sec. 53 (b) (e) of the Hackney Carriage Act.

Counsel will be pleased to advise—

(1) Whether the expenditure of the said sum of Rs 3,812-8-8 is permissible either under the Calcutta Municipal Act or the Hackney Carriage Act or both combined, or is it *ultra vires* under the said Acts?

(2) Whether in the event of the expenditure not being admissible under Sec. 60 of the Hackney Carriage Act and having regard to the provisions of Sec. 86 of Calcutta Municipal Act it is obligatory on the General Committee under Sec. 88 to invite tenders in every case therein mentioned involving an expenditure of exceeding Rs. 1,000 irrespective of the fact whether a contract in writing is to be entered into by the Chairman or not?

CASE —(*concld.*)

Hackney Carriage Horses' Discs. (concld.)

(3) Who is to determine whether a contract should be entered into or not?

(4) And generally as to the steps to be taken as to the payment of the said sum of Rs. 3,812-8-3 in the events which have happened.

OPINION.

(1) The expenditure in question is not authorised either under the Calcutta Municipal Act (III of 1899) or the Hackney Carriage Act (II of 1891). I do not think that the Commissioners could under Sec. 53 of the latter Act make a Bye-law requiring these discs, etc., to be used "in hackney carriages." But even if they could do so, they have not done so in fact and therefore the expenditure in question was not incurred in carrying out the purposes of that Act.

Nor does it come under Sec. 14 (2) xi, as the administration of Hackney Carriages is vested in the Commissioners under Act II of 1891 and not under Act III of 1899.

(2) & (3). These questions arise only if the expenditure is authorised under Act III of 1899 (which in my view it is not). But assuming that it is authorised, I think Sec. 88 applies, and the formalities required not having been complied with, the Corporation is not bound by the contract but it cannot retain the goods and at the same time refuse to pay for them.

(4) I think the only thing to do is to get the Hackney Carriage Act amended, in such a way as to authorise expenditure of the kind in question, out of the Hackney Carriage Fund.

10th June, 1911. S. P. SINHA.

Lease of 6, Corporation Street to the Hindusthan Co-operative Insurance Society.

CASE.

Hindusthan Co-operative Insurance Society. Lease of Land to.

Tenders were called for leasing out the land on the eastern side of the Municipal buildings on the 26th of July, 1909. The Hindustan Co-operative Insurance Society by letters dated the 30th July, and 2nd of August enquired as to the lease, and on the 4th of August formally tendered to take a lease of the surplus lands to the east of the Municipal Office Buildings for 99 years at a monthly rent of Rs. 12 per cotta for the first five years and Rs. 15 for the remaining term, on the conditions of the tender. It may be noted that the tenderers were expected and were given liberty, to inspect the land and submit sketch plans of the buildings proposed to be erected on the site. Plans of the lands prepared by the Corporation were also supplied to the tenderers. Certain informations regarding the amounts to be contributed by the share-holders of the Society towards the building were required by the Corporation and supplied by the Society. The matter was thereafter considered by the General Committee to the Corporation of Calcutta on the 6th of August, 1909 when the General Committee [under Sec. 357 (5)] accepted the offer of the Hindustan Co-operative Insurance Society Limited on the condition that the Society would get six of the share-holders named in their letter of the 6th August to guarantee that the terms of the agreement would be carried out and that the building would be erected within the stipulated time. It was also proposed to insert a clause in the agreement providing against the contingency of the Society going into liquidation. The resolution of the General Committee was communicated to the Society by the Secretary to the Corporation by his letter dated the 11th of August. The Society by a letter dated the 20th of

CASE.—(*contd.*)

Hindusthan Co-operative Insurance Society. Lease of Land to. (contd.)

August objected to the clause regarding liquidation on insolvency and enclosed a letter of guarantee signed by six of their share-holders. The Society also applied for two months' time from the date of receipt of the reply for submitting the plan of the building proposed to be erected.

In reply, the Secretary to the Corporation wrote requestioning the Society to arrange to have the necessary bond executed by the six share-holders intimating also that a draft of the required bond would be sent to them. The Society was also asked to deposit six months' rent as security-deposit in terms of the conditions of tender. The draft bond was sent to the Society on the 7th of October, 1909. The Society was also written to to approve the draft bond and deposit the six months' rent within the 14th of the month and also to forward a draft lease for the approval of the Corporation Solicitor. The Society, if may be noted here, have not up till now approved and executed the draft indemnity-bond sent to them for approval and execution, nor have they sent a draft lease for the approval of the Corporation. Meanwhile on the 9th of October, the Society had sent a cheque for Rs. 7,425. The paragraph 1 of the letter accompanying the same runs as follows:—"We send you herewith a cheque for Rs. 7,425 and take it that the land is in our possession from the date." The Society also wanted to consult their solicitor as to the draft indemnity bond sent for approval. On the same date 9th October the Society entered into an arrangement with one Mr. H. Benis to lease out a portion of the land from the 13th of October, 1909 at a rental of Rs. 175 per month. On the 12th of October, the Secretary of the Society wrote stating that they were under a misapprehension as to the possession of the land, and intimated that the Society were prepared to wait till after *Idh* in

CASE.—(*contd.*)

Hindusthan Co-operative Insurance Society. Lease of Land to. (contd.)

taking possession of the whole plot; and on 14th/15th October the Secretary of the Society for the first time intimated that they would require vacant possession of the whole land. The Secretary to the Corporation replied to the same on the 18th of October. Meanwhile Mr. Benis had presented to the Corporation the letter of authority issued by the Society to him on the 9th of October preceding leasing to him a specified portion of the land and demanded possession of the same. This letter was not, it may be noted, cancelled or withdrawn by the Society in view of the difficulties raised by them as to the delivery by the Corporation of vacant possession, with the result that when on the 18th of October Mr. Benis demanded possession the same was duly made over to him on the same date; and Mr. Benis thereupon erected a pavillion on the land for his show It is to be noted that Mr. Benis had paid for the occupation of the land to the Society, and it was only when the Corporation wanted to fix the Society to their acceptance of possession through Mr. Benis by a letter dated the 1st of November, 1909 that the Society sought to repudiate the matter and it is believed obtained a statement from Mr. Benis pleading mistake, though the fact of the delivery of possession was duly intimated to the Society by the Secretary to the Calcutta Corporation by a letter dated the 28th of October. Thereupon the Society by a letter of the same date the 29th of October but received on the 2nd of November wrote back disclaiming the sub-lease to Mr. Benis and his authority to take possession. In reply the Secretary to the Corporation drew the attention of the Society on the 4th of November, to the letter of authority to Mr. Benis, a copy of which was enclosed therewith.

While this correspondence was going on, it was discovered by the Corporation that there was a sort of mosque or prayer-house occupying a portion of the land in

CASE.—(*contd.*)

Hindusthan Co-operative Insurance Society. Lease of Land to. (contd.)

question, and that consequently difficulties would arise in giving vacant possession of that portion of the site to the Society. On the 8th of November, the Secretary of the Society replied stating that the District Engineer III to the Corporation had assured him that there would not be any hitch as to Mr. Benis beginning work in anticipation provided the Society accepted vacant possession in spite of Mr. Benis being there. In the same letter, notice was given to the Secretary to the Corporation that in case vacant possession could not be delivered within three days from the date thereof, the Society would charge interest at 6 per cent. on Rs. 7,425 the amount of six months' rent deposited by the Society in advance in accordance with the conditions of the tender. The letter also enclosed another from Mr. Benis to the Society dated the 3rd of November pleading mistake in taking possession of a portion of the land. It is to be noted that no mention of this letter was made previously, and that Mr. Benis does not seem therein to bear out the allegations as to the acceptance of possession contained in the original letter of which it was an enclosure. On the 17th of November the Secretary to the Corporation enquired by letter, without prejudice, whether the Society would be prepared to take a lease of the remainder of the land excluding the prayer house on the same terms as those accepted by the General Committee. The decision of the Society on this was communicated by a letter dated the 7th of December intimating the inability of the Society to accept such a lease excluding the site occupied by the prayer house, and offering also as an alternative, without prejudice, to take up the remainder of the land on modified terms in lieu of damages claimed and at the same time threatening specific performance in addition to a claim for substantial damages, which latter it may be noted, were not specified therein. The matter was

CASE.—(*concld.*)

Hindusthan Co-operative Insurance Society. Lease of Land to. (contd.)

placed before the General Committee on the 10th of December which decided to take Counsel's opinion as to the position of the Corporation in this matter.

The powers of the General Committee to lease the land are contained in Sec. 357 of Act, III B. C., of 1899 The provisions of the Law relating to contracts entered into by the Corporation are embodied in Sec. 86-89 of the Act.

Counsel will be pleased to advise :—

(a) Whether the facts and circumstances of the case disclose the existence of any valid legal contract with the Hindustan Co-operative Insurance Society binding and operative on the Corporation, and if so is it capable of being specifically enforced against the Corporation or the General Committee to the Corporation?

(b) Whether the Society have, in view of the authority to Mr. Benis and the circumstances connected with the delivery of possession by the Corporation to the latter, taken possession of the land under consideration?

(c) Whether the Society have, in view of the impossibility on the part of the Corporation to deliver possession of the portion of the land on which the prayer-house stands, any right to claim specific performance?

(d) Whether the Society are entitled to any damages under the circumstances of the case, and if so, on what basis?

(e) What action should the Corporation take under the peculiar circumstances of the case?

OPINION.

Hindusthan Co operative Insurance Society. Lease of Land to. (contd)

(a) Section 5 of the Calcutta Municipal Act of 1899 creates three distinct Municipal authorities to carry out the provisions of the Act *viz*, (1) a Corporation, (2) a General Committee of the Corporation, and (3) a Chairman of the Corporation. Section 18 enacts that the respective functions of these several authorities shall be such as are specifically prescribed by the Act. Sec. 553 empowers the Corporation to lease any land vested in them. Sec. 86 empowers the Corporation to enter into and perform all such contracts as they may consider necessary or expedient for carrying into effect the provisions of the Act; but every such contract is to be made on behalf of the Corporation by the Chairman; and Sec. 87 expressly enacts that no contract shall be binding on the Corporation if it is not executed with the statutory formalities provided in that section. Sec. 587 requires public notices given under the Act to be in writing under the signature of the Chairman. Now none of these requirements appears to have been complied with in the present case. The advertisement for tenders, dated 26th July, 1909, was under the signature of the Secretary to the Corporation; and although the first letter from the Insurance Society, dated 30th July, 1909, was addressed to the Chairman and Members of the General Committee, the subsequent correspondence on the subject of the proposed lease was with the Secretary to the Corporation. I am not informed whether under Sec. 18 of the Act the Chairman has duly delegated any of his powers, duties, or functions to the Secretary, but in the view I take of the case it is immaterial to consider whether or not he has done so. On 4th August, 1909, the Insurance Society made its tender; and on 11th August 1909, the Secretary writes to inform them that the General Committee accepted the Insurance Society's offer to take the land on the terms and subject to the conditions

OPINION.—(*contd.*)

Hindusthan Co-operative Insurance Society. Lease of Land to (contd.)

specified in that letter, one of such terms being that after the first five years the Society should pay Rs. 16 per cotta for the remaining term of the lease. On 20th August 1909, the Society wrote that their tender for rent after the first five years of the lease was Rs. 15 and not Rs. 16 per cotta, and they also took exception to a proposed additional clause for re-entry by the Corporation on the liquidation or insolvency of the Society. From the Secretary's letter of 10th August, 1909, it would seem that the General Committee's demand for Rs. 16 rent per cotta after the first five years of the lease and the additional clause for re-entry by the Corporation on the liquidation or insolvency of the Society were dropped, and that, subject to the execution of a formal bond to the satisfaction of the Solicitor of the Corporation by six of the share-holders of the Society named in their letter of guarantee of 6th August 1909, the Society's tender was accepted by the General Committee. On 7th October 1909 the Secretary demanded a deposit of Rs. 7,425, being the approximate amount of six months' rent; and at the same time forwarded a draft bond for the Society's approval. On 9th October 1909 the Society sent to the Secretary a cheque for Rs. 7,425 which was duly acknowledged, and the Treasurer's receipt for the sum was enclosed in the Secretary's letter of 18th October, 1909. It may here be noted that under the terms of the advertisement the deposit of the equivalent of six months' rent was claimable only after the acceptance of the Society's tender; and payment of this rent amounted to part performance by the Society of their contract to take a lease of the land in question. That contract is still conditional on the execution of the formal bond to the satisfaction of the Solicitor of the Corporation, but on this condition being fulfilled there will be, in my opinion, a

OPINION.—(*contd.*)

Hindusthan Co-operative Insurance Society. Lease of Land to. (contd.)

valid legal contract binding on the Corporation to grant a lease to the Society of the land in question for 99 years on the terms specified in the advertisement and the subsequent correspondence. Mere difficulty of a pecuniary nature in getting the mosque removed would afford no defence to a suit by the Society for specific performance of this contract; nor would the fact that the contract had been made on behalf of the Corporation by unauthorised persons, and without proper statutory formalities, prevent the Court from decreeing specific performance of the contract in view of its part performance by the Society: see *Wilson V West Hartlepool, etc., Company* 34 Bea. 187. 2 De G. J. & S. 475. In the last cited report Turner J. says (*Vide* p. 498) that in the eye of the Court it would be fraud on the part of the Corporation taking a benefit under the contract to set up the absence of authority or want of statutory formalities as a defence to a suit for specific performance, and according to Brice in his treatise on *Ultra Vires*, the question appears to be not whether there is a binding contract, but whether the Corporation is estopped from setting up the defence that there is no binding contract. Impossibility of performance of the contract in its entirety would preclude the Court from decreeing specific performance of such contract; *Smith V. Green* 1 Atk 573, and s. 17 of the Specific Relief Act. The case would then have to be dealt with under ss. 14 or 15 of the Specific Relief Act, the application of one or other of these sections depending on whether or not it is possible to award compensation in money for the part of the contract which it is impossible to perform, but specific performance of the remainder of the contract can be granted by the Court.

(b) If the facts are as stated in the Society's letter of 8th/9th November 1909, they have not taken possession of the land, or any portion of it.

OPINION.—(*concld.*)

(c) and (d) See my answer to query (a).

Hindusthan Co-operative Insurance Society. Lease of Land to. (concld.)

(e) The Corporation should try to come to terms with the Society on the footing of the last paragraph in the Society's letter of 7th December, 1909.

31*st December*, 1909. C. P. HILL.

Roads opened by public companies under special Acts—Liability for proper restoration—Proposed Corporation specification if legally enforceable.

CASE.

Road Restoration by Public Companies.

The Municipal Authorities with a view to the proper maintenance of the Public streets vested in them under the Calcutta Municipal Act have drawn up and approved a specification for road repairs the observance of which they intend henceforth to enforce against contractors as a term in every contract connected with street works, and have directed that every Contractor or other person or Company who has or have anything to do with the opening or breaking up of streets and restoring the same to proper condition, shall be called upon to observe and perform the terms of the said specification.

As however the Gas Company, the Tramways Company and the Electric Supply Corporation have got special Acts of their own whereby they are empowered to open or break up any street or road for the purposes of their own Acts and are liable to reinstate and make good the road and to maintain the same as mentioned in the several Acts viz :—

(1) Act V. of 1857, Secs. 5, 6, and 7.

(2) The Calcutta Tramways Act, (Act I of 1880) Sec. 12 and the several clauses thereof.

(3) The Indian Electricity Act (Act IX of 1910) Sec. 12 and 13.

CASE.—(*concld.*)

Road Restoration by Public Companies. (contd.)

It is to be considered whether the Corporation is competent to enforce the terms of the said specification against these Companies or bodies notwithstanding any objection on their part.

It is also to be considered whether the Corporation assuming that one of these Companies fails to restore the road properly to its former condition, can legally have the road made good in terms of the said specification and recover the cost for so doing from that Company.

OPINION

The Corporation is entitled to have such *streets* as are broken up under compulsory powers (*e g*, under the Gas Company's Act, the Tramways Act and the Electricity Act 1910) restored to as good a condition as that in which they were before they were so broken up.

Under the Oriental Gas Company's Act of 1857, Sec. 5, the Company are bound "to fill in the ground and re-instate and make good the road or pavement . . . so opened or broken up." Under the Calcutta Tramways Act of 1880, Section 12 the Company are bound "to fill in the ground and make good the surface and to the satisfaction of the Corporation restore the street or bridge to as good a condition as that in which it was before it was opened or broken up". Under the Electricity Act 1910, the Company are bound "to fill in the ground and make good the soil or pavement . . . . . opened or broken up."

I think the obligation is the same in all 8 cases, *viz.*, to restore the street broken up to its original condition, *i.e.*, as nearly as possible identical with the road before the interference (see E. V. Birmingham and Gloucester Railway 2 Q.B. 47) and this cannot be done by merely making the surface level with the rest of the street. The

OPINION.—(*concld.*)

Road Restoration by Public Companies. (concld.)

pavement and soil making up the street must be restored as nearly as possible to their original condition. Nor can it be said with any reason that as the companies in question are liable to maintain the restored portion in repairs for a certain period after restoration, the obligation to restore is satisfied merely by making the surface level with the rest of the road. It is clear that their duty is first to restore, *i e*, to make it what it was before in its entirety and not merely as to its surface and next to maintain it in repair for the periods respectively prescribed.

It is clear that the Corporation cannot call upon the companies to do more than their respective Acts lay down and if and in so far as the specification in question requires them to do more than what is reasonably necessary for the purpose of restoration or reinstatement they are not bound to comply with it.

The question whether the specification requires the companies to do more than is reasonably necessary to restore the road broken up to its original condition is one of fact which can be determined only by Engineers and experts in roadmaking. If the Corporation and the companies are unable to agree on the question, the proper and reasonable thing to do is to refer it for decision to one or two experts, *e.g.*, the Chief Engineer to the Government of India or Bengal or some such high authority in whom both parties have confidence.

I understand the main if not the only point of difference is as to whether the companies are bound to lay soling bricks in cases where no such soling now exists. The Corporation is however willing to make a concession on this point by offering to pay for such soling themselves, I do not see what reasonable objection can be raised on behalf of the Companies to this concession.

8th August, 1911.

Stone setting Tram Tracks which have only macadam at present—Liability of Tramways Company and powers of Corporation.

CASE.

Tram Tracks. Stone Setting. No formal case was submitted. The company having declined to comply with the requisition of the Corporation to lay down stone setts in certain streets and the parties having failed to come to any agreement it was settled that they should submit a case for the opinion of the Court as to their respective powers and duties in the matter.

The case for submission to the court was laid before Counsel for approval and the following opinion was obtained. Para. 14 of the proposed reference alluded to by Counsel in his opinion is reproduced for facility of reference.

"The total length of rails laid along roads and streets vested in the defendant Corporation is about 25 miles. At the time of the original construction of the tramway all the streets vested in the Corporation were macadamised and at present, except as regards a portion of Strand Road, no portion of the roads and streets maintainable and repairable by the defendant Corporation along which the tram lines are laid, and a very few roads in which there are no tram lines are stone paved."

OPINION.

On reconsideration I am inclined to think that the contention of the Tramways Company that *maintenance and repair* do not include paving with stone setts of roads which previously had no such stone setting is well founded. See the case of *Leek V. Stafford Justices* 20 Q.B.D. 794, where Lord Esher and Lord Justices Lindley and Bowen held that converting a macadamized road into

OPINION.—(*concld.*)

Tram Tracks. Stone Setting. (concld.)

a paved road does not come within the term "maintenance" of the road as used in S. 13 of 41 and 42 Vict. c. 77.

I do not think the facts were sufficiently before me when I gave my opinion* on this point (which was quite a minor question in the case submitted) in 1906.

Now that I see that the facts are admitted to be as stated in para. 14 of the case proposed to be stated for the opinion of the Court, I would advise the Corporation to give up this claim. It is hardly worth while to incur expense for the purpose of getting a decision which will be adverse to the Corporation in all probability.

When the Corporation have paved any street with stone setts, it will be time enough to consider how far they can call upon the Tramways Company to do the same, so far as their portion of that street is concerned.

The case of Dublin United Tramways Company V. Fitzgerald [L.R. (1903) A.C. page 99] may at first sight appear to be in favour of the contention of the Corporation but the facts were different, as the Tramways Company was then under an obligation to repair "with such materials" as the road authority (*viz.*, the Dublin Corporation) required and had, in fact, carried out the directions of the Corporation to pave their portion with granite setts.

20*th May*, 1912. S. P. SINHA.

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* *Vide* Opinion on page 216 of the 1st volume of Legal Opinions and Rulings

Woodburn Park Spare Lands—Sale to Mr. Galstaun — Erection of structures by Mr Galstaun on Corporation land—Question of ejectment.

CASE.

Woodburn Park Spare Lands. Sale to Mr. Galstaun.

In this case the Corporation of Calcutta obtained from the Government by way of free gift a plot of land originally appertaining to what was known as Kasia Bagan Burial Ground and measuring about 24 bighas 9 cottas for certain public purposes subject to certain terms and conditions, *vide* letter dated the 18th November, 1902 from B. W. Collin, Esq., I.C.S., officiating Secretary to the Government of Bengal to the Chairman of the Corporation of Calcutta briefed herewith. The terms preclude the Corporation from selling the land as therein mentioned.

It is to be noted that Government got this land as a result of a compromise in a civil suit and one of the terms of the said compromise decree was that the Government should have to make a 50 feet wide road for a distance of 900 feet through this land from Circular Road towards Elgin Road.

The Corporation obtained possession of the said land on or about the 21st day of March, 1903, and they subsequently in the month of May, 1904, acquired a further plot measuring about 7 bighas 12 cottahs 8 chittacks 36 square feet for the extension of the dhobikhana and the extension of the road from Lower Circular Road to Elgin Road.

The Corporation has set apart a portion of the land for Woodburn Park, and the road to be called Woodburn Park Road.

There is a dhobikhana on the other side of the land granted by Government.

After providing for the Park, certain negotiations for the sale of surplus land consisting of plots B and C and

CASE.—(*contd.*)

Woodburn Park Spare Lands. Sale to Mr. Galstaun. (contd.)

D referred to in the plan (which was annexed to the case) were entered into with Mr. Galstaun, all these plots form part of the land granted by Government as aforesaid. The hatched portions on the plan show the encroachment made by Mr. Galstaun.

As evidence of such negotiations Counsel's attention is invited to the following letters and proceedings of the Corporation :—

Corporation resolution dated the 22nd July 1908 confirming the Resolution of the Estates and General Purposes Committee dated 24th June, 1908, to the effect that subject to the consent of Government this land be sold to Mr. Galstaun at a rate to be fixed by the Assessor.

Thereupon on 30th July, 1908, the Secretary to the Corporation wrote to Mr. Galstaun a letter copy of which is as follows :—

"The Corporation has sanctioned the sale to you of the land on the north side of Woodburn Park site which you applied to purchase, subject to the sanction of the Government. I am directed to inform you that this land has been valued as follows :—

Plot B 1 big. 1 cot. 7 ch. 14 sq.ft. at Rs. 450 per cottah.
Plot C 0 big. 8 cot. 3 ch. 26 sq.ft. at Rs. 650 per cottah.
Plot D 0 big. 2 cot. 9 ch. 15 sq.ft. at Rs. 900 per cottah.

The areas are approximate. On your accepting the rates, application will be made to the Government for sanction to sell the land."

To this, Mr. Galstaun replied accepting the offer in the terms following :—

Your No. $\frac{A.G.\ 197}{V.\ 1964}$ of 30th ultimo to hand, I find the valuation for the tank lands much in excess of the actual value; it must be remembered that these lands cannot be utilised for building purposes for a considerable

CASE.—(*contd.*)

Woodburn Park Spare Lands. Sale to Mr. Galstaun. (contd.)

time, however as the matter has been hanging fire for a considerable time and is likely to prolong longer if I objected to the valuation, I reluctantly agree to the valuation and will take the 3 plots of land B. C. D., at your price, *viz.*, Rs. 450, Rs. 650 and Rs. 900 per cottah respectively."

Thereafter Government was written to for sanction.

Then again on the 30th November, 1908, Mr. Galstaun, having in anticipation of Government sanction, started building operations and was requested to discontinue building operations.

Government on the 11th December, 1908 wrote in reply to the letter dated 17th November 1908 as follows : --

"I am directed to acknowledge the receipt of your letter No. S/I-2953, dated 17th November, 1908, with which you forward a copy of the Proceedings of the Corporation of Calcutta recommending the sale of certain plots of land including the sale of certain plots of land included in the Woodburn Park, with a view to straightening its boundary line.

(2) In reply I am to observe that the land in question was originally purchased by Government for a public purpose and it was subsequently decided by Government that it should not be sold to a private person, but should be given, free of revenue, to the Corporation for use as a Park or for some other public purpose. If the proposed sale is now effected, the sale proceeds should, therefore, be credited to Government and not to the Municipal Fund. I am to request that the proposal may be reconsidered in the light of the above remarks."

This letter was considered by the Estates and General Purposes Special Committee at their meeting held on the 22nd December, 1908, and they resolved to the

CASE.—(*contd.*)

Woodburn Park Spare Lands Sale to Mr. Galstaun. (contd.)

effect that Government should be requested to reconsider the matter in view of the heavy expenditure incurred etc.

This resolution came up for confirmation before the Corporation at their meeting held on the 3rd March 1909, when the Corporation adjourned the consideration of this matter pending the decision with regard to the proposed new road.

It is to be noted that Mr. Galstaun, in the meantime, started building operations on plot C without obtaining any plan sanctioned as required under the Municipal Act.

As regards plots B and D there have been encroachments made by Mr. Galstaun but these unfortunately are covered by sanctioned plans under the Municipal Act The boundaries of the sites were not carefully examined by the officers of the Corporation and the plans were sanctioned on the faith of the representations made as per plans submitted by Mr. Galstaun shewing that the portions in question formed part of his own land as part of premises No. 233, Lower Circular Road.

As regards building on plot C Mr. Galstaun sent in a plan on the 16th day of November, 1908, sanction to which was refused on the 10th December, 1908.

A notice was served on Mr. Galstaun on 6th November 1908, under Sec. 451 of the Calcutta Municipal Act, not to proceed with the building (at this time he was laying the foundation of the building). Application for his prosecution under Sec. 574 was made on 5th December, 1908 (*i e*, application was made before the Magistrate). Thereupon, Mr. Galstaun addressed a letter dated 12th February, 1909, to the Chairman and the Chairman thereon passed orders for staying prosecution. Ultimately on 19th July, 1909, the Acting Chairman passed

CASE.—(*contd.*)

Woodburn Park Spare Lands Sale to Mr. Galstaun. (contd)

orders for the withdrawal of the proceedings and the proceedings were withdrawn on 23rd July, 1909.

The building that has thus been erected without sanction on land vested in the Corporation for a public purpose is a two-storied building.

It is submitted on behalf of the Corporation that Mr. Galstaun has erected the building on plot C at his own risk and without any right whatsoever to do so, and that Corporation is at liberty to rescind the resolution of 22nd July 1908 and recover possession of the land in question without being liable to pay any compensation to Mr Galstaun in respect of the building unlawfully erected by him.

If Government does not agree to allow the Corporation to appropriate the sale proceeds of this land it is believed that the Corporation will not proceed with the negotiations for sale any further.

It is to be noted that the Government letter dated 11th December, 1908, is neither a sanction nor consent nor a refusal, Government desired the Corporation to reconsider the matter in view of the fact that the sale proceeds should be made over to Government and not be credited to the Municipal funds.

Mr. Galstaun on the other hand interprets that that letter conveys a consent to the sale of the land to him but raises the question of the disposal of the sale proceeds as between the Corporation and Government, with which the purchaser Mr. Galstaun has nothing to do.

Then, as regards the erection of the building without sanction, Counsel's attention is invited to Secs. 372, 449, 579 of the Calcutta Municipal Act. It may be mentioned that ordinarily steps or proceedings are not taken for demolition of a building unless the build-

CASE.—(*contd.*)

Woodburn Park Spare Lands. Sale to Mr. Galstaun. (contd.)

ing in question violates some of the building regulations contained in Schedule XVII of the Calcutta Municipal Act.

Further it is to be noted that in this case inasmuch as the land has not yet been conveyed to Mr. Galstaun no plan could have been sanctioned by the Corporation without prejudicing their own rights in relation to the land in question. To prosecute a person for building without sanction pre-supposes that sanction could have been given if the same had been applied for and the plan in question had been in order irrespective of the question of title of the applicant to the site of the building *e.g.*, if this piece of land had belonged to some other party than the Corporation, then there would have been no objection to sanctioning the plan, and the Corporation, could not have gone into the question of conflicting title to the land if some claim had been put forward by some person other than the applicant for sanction.

In the case of a conflicting title it is no part of the duties of the sanctioning authorities to determine that question (the question of title).

It is submitted that the Corporation, by sanctioning a plan, does not adjudicate on the question of title of the applicant to the site as against a rightful owner. It is submitted that the rightful owner can always assert his right and have his remedy against the wrongdoer, in a case like this, not against the Corporation but the applicant for sanction.—

Having regard to all these circumstances Counsel is requested to advise :—

(1) Whether there is a subsisting and binding contract for sale between the Corporation and Mr. Galstaun?

(2) Whether the Government letter dated 11th December 1908, can be treated as a sanction to the sale to Mr. Galstaun.

CASE.—(*contd.*)

Woodburn Park Spare Lands. Sale to Mr. Galstaun. (contd.)

(3) Is it open to the Corporation to rescind the contract, if any, if so, how it should be done.

(4) What step should the Corporation take to recover possession of the land built upon by Mr. Galstaun?

(5) Whether the Corporation or the General Committee should take proceedings under Section 449 of the Act, for the demolition of the building in question and generally as to the course to be adopted by the Corporation.

Letter No. 2775-M, dated 18th November, 1902, from the Government of Bengal.

"In continuation of Government Order No 1820-T.M, dated 17th September, 1902, I am directed to forward for the information of the Corporation a copy of a letter from the Government of India in the Department of Revenue and Agriculture sanctioning the grant to the Corporation, free of revenue, of the Government land at Kasiabagan measuring about 8 acres in extent for use as a Park and site of sanitary dwellings for people of the working and servant classes on the terms offered by the Corporation in Mr Gainsford's letter to the Commissioner of the Presidency Division No. 7458-4, dated 4th July, 1902, and subject to the conditions laid down by the Government of India A copy of the Financial Department Resolution No. 91-A, dated 19th February, 1902, referred to in the letter from the Government of India is forwarded for information. I am to request that you will arrange with the Board of Revenue for taking possession of the land.

2. I am to request that the preparation of the scheme for the construction of sanitary dwellings on the site as proposed in your letter No. 10128-H, dated 8th September, 1902, may be expedited and that it may be submitted to Government as soon as it is ready."

CASE.—(*concld.*)

Letter No. $\frac{683}{576-2}$ *dated 3rd November, 1902 from Government of India to Government of Bengal sanctioning the grant to the Corporation.*

Woodburn Park Spare Lands. Sale to Mr. Galstaun. (contd.)

With reference to your letters Nos 1684-T M., and 1821-T.M , dated respectively, the 11th and 17th September last (addressed to the Home Department), I am directed to convey the sanction of the Government of India to the grant, free of revenue to the Corporation of Calcutta of a plot of land about 8 acres in extent in the Punchannogram Estate in the Added Area of the Town of Calcutta subject to the usual conditions as to resumption and to the terms set forth in paragraph 2 of your letter No. 1684-T.M., dated the 11th September, last. It should also be stipulated, in making the grant, that the land shall not be sold or leased, or be used for any other purposes than those specified, except with the previous sanction of Government.

OPINION

It is desirable to consider generally the present situation in which the Corporation is placed in this matter before the question put to me can be satisfactorily answered. It is to be noted that the grant was made by the Government in 1903 to the Corporation of the land in question for certain specified public purposes, and imposed a condition that the Corporation was to have no power of sale or lease in respect thereof, except with the previous sanction of the Government. I take it that it was a grant covered by the provisions of the Crown Grants Act, 1895 and therefore did not require a formal conveyance although the correspondence shows that a formal deed was contemplated, which, however, was apparaently not executed. The land in question, therefore is not vested in the Corporation in the same way as other town-lands with which the Corporation is free to deal. It is further to be observed that where there is a condition imposed to obtain the sanction of the

OPINION.—(*contd.*)

Woodburn Park Spare Lands. Sale to Mr. Galstaun. (contd)

Government to deal with the land, such sanction must be obtained prior to the dealing itself in order to make it valid. The result therefore seems to me to be that the land in question is vested in the Corporation as trustee to carry out certain specified public trusts and the Municipality is precluded from dealing with it except for the purpose of those trusts without the previous sanction of the Government. The resolution to sell the land to Mr. Galstaun "subject to the consent of the Government" and the acceptance by Mr. Galstaun of the contents of the letter of the Secretary could not in my opinion create a valid contract for sale which could be specifically enforced. Apart from the provisions of Sec. 21 (d), (e) and (f) of the Specific Relief Act, the provisions of the Municipal Act, Secs. 86 and 87 so far as they are applicable shew that no contract to sell so as to create a legal obligation on the Corporation was entered into. The subsequent events, which I need not mention in detail, are sigularly unfortunate. On the one hand, the Corporation seems to have proceeded without due regard to that carefulness and legitimate caution which one would expect from a public body and on the other, Mr. Galstaun's sole object seems to have been to forestall the action of the Corporation and force its hands. However that may be, it appears to me that the letter of the Government dated 11th day of December, 1908, cannot be construed to have given sanction to the sale, reserving only the question of appropriation of the sale proceeds. It only invited the Corporation to re-consider its position in the light of the remarks contained in the letter and said nothing further. In spite of the terms of that letter and in defiance of the objection of the Corporation, Mr. Galstaun chose to put up a building on plot C without having obtained sanction of the Corporation in that behalf under the

OPINION.—(*contd.*)

Woodburn Park Spare Lands. Sale to Mr. Galstaun (contd.)

provisons of the Municipal Act. I desire to dispose of this question of the Municipal sanction of proposed buildings at this stage, so as to put that question out of the way entirely. I am of opinion that the statutory obligation created by the Municipal Act to grant sanction for a proposed building or the right to withhold such sanction cannot be utilised either by the Corporation or Mr. Galstaun in connection with the question of the validity of the alleged contract in the present case, and Mr. Galstaun's action in connection with the said alleged contract. The Corporation is bound by the terms of its statute and cannot enter into the question of title of the applicant for sanction while acting under the statute.

I am, therefore, of opinion that Mr. Galstaun is liable to ejectment from plot C and that without any compensation for his building; and if he loses any money thereby, he has only to thank himself.

As to encroachments in plots B and D, Mr. Galstaun's position is the same in spite of the fact that the plans therefor seem to have been sanctioned by the Corporation. As I have already said, the Corporation could not have withheld such sanction on the score of title to the portion encroached upon. There is no equitable right to compensation where a man builds upon land which is not his own and with knowledge of infirmity of his title.

I now answer the question *seriatim* :—

1 & 3. I do not think there is a subsisting contract, and therefore, it is not necessary to rescind it. But it would be better for the Corporation to come to a resolution that in the events that have happened the negotiations with Mr. Galstaun are at an end. Mr. Galstaun should also be written to say that negotiations are at an end, and he should be asked to make over vacant possession to the Corporation.

OPINION.—(*concld.*)

Woodburn Park Spare Lands. Sale to Mr. Galstaun. (concld)

(2) I do not think so.

(4) If Mr. Galstaun refuses to vacate, I am afraid the Corporation must sue him in ejectment.

(5) I should not be inclined to advise any action under the provisions of Sec. 449 of the Calcutta Municipal Act, specially regard being had to the singularly irresolute way in which the Corporation has proceeded from time to time . Proceedings under the section may or may not succeed, and I am disinclined to advise the Corporation to take a course which may be unsucessful

20*th September*, 1909. B. CHAKRAVARTHY.

APPENDIX A

Clause (1) *of the Bye-laws under Section* 559 (18) *of the Calcutta Municipal Act regarding encroachments, etc*

When any person has, whether before or after the passing of these bye-laws, placed or allowed to be placed any wall, fence, rail, post, platform, plank, culvert or other masonry or brickwork erection (not being a fixture attached to a building within the meaning of Section 341 of the Act) or any structure, in such a position as to cause a projection, encroachment, or obstruction over or on any public street or over or in any drain or aqueduct in a public street or over or on any land vested in the Corporation, the Chairman may, by written notice, require the owner of, or the person who has erected such wall, fence, rail, post, platform, plank, culvert, erection or structure to remove the same within a reasonable time and any person who fails to comply with the terms of such notice shall be liable to a daily fine which may extend to Rs. 10 per diem for every day after the expiry of the time specified in the notice.

Vide Reference in Ruling on Narain Chandra Chatterjee *vs* Corporation page 29.

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